SUPREME COURT OF THE UNITED STATES.

No. 273.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

MOSES MACDONALD, LEVI MORRILL, SAMUEL JORDAN, AND HARRISON J. LIBBY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Clerk's certificate	3	2
Attachment	4	2
Judgment	18	8

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the first circuit and district of Maine, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between the United States of America and Moses Macdonald, Levi Morrill, Samuel Jordan, and Harrison J. Libby, a manifest error hath happened, to the great damage of the said United States of America, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-four, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

GEO. F. EMERY,
Clerk circuit court of United States for Maine District.

Allowed.

NATHAN CLIFFORD,
Associate Justice of the Supreme Court of the U. S.

MAINE DISTRICT, *ss:* SEPTEMBER 26TH, A. D. 1864.

Pursuant to the within writ, I send herewith, as within required, the record and proceedings within referred to.

2 United States of America to Moses Macdonald, Levi Morrill, Samuel Jordan, and Harrison J. Libby, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the first circuit and district of Maine, wherein the United States of America are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, one of the justices of the said Supreme Court of the United States, this sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-four.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

I acknowledge legal service of the foregoing citation and admonition.

MOSES MACDONALD,
Attorney for the others.

3 UNITED STATES OF AMERICA,
District of Maine, ss:

OFFICE OF THE CLERK OF THE CIRCUIT COURT U. S.

I, Geo. F. Emery, clerk of the circuit court of the United States for Maine district, hereby certify, that the papers hereunto annexed contain a true and perfect transcript of the record and proceedings in a suit determined in said court, wherein the United States of America are plaintiffs, and Moses Macdonald and others are defendants.

In testimony whereof, I hereunto set my hand and affix the seal of said court this twenty-sixth day of September, A. D. one thousand eight hundred and sixty-four.

GEO. F. EMERY, *Clerk.*

4 DISTRICT OF MAINE, *ss:*

The President of the United States of America, first circuit of the United States, to the marshal of our district of Maine or his deputy, greeting:

We command you to attach the goods or estate of Moses Macdonald and Harrison J. Libby, of Portland, and Levi Morrill and Samuel Jordan, of Westbrook, in our said district, to the value of fifty thousand dollars, and for want thereof to take the bodies of said defendants (if he may be found in your precinct) and them safely keep, so that you have him before our circuit court next to be holden at Portland, within and for our district of Maine, on the twenty-third day of September next, then and there in our said court to answer unto the United States of America in a plea of debt, for that the said defendants, at said Portland, on the twentieth day of January, in the year of our Lord eighteen hundred and fifty-eight, by their writing obligatory of that date, sealed with their seals and here in court to be produced, dated the day and year last aforesaid, bound themselves unto the said United States in the sum of fifty thousand dollars, to be paid to the said United States by said defendants on demand.

Yet, though requested, said defendants or either of them have not paid said sum, but owe and detain the same to the damage of the said plaintiffs, as they say, the sum of fifty thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ, with your doings herein.

Witness the Honorable Roger B. Taney, at Portland, the eighth day of September, in the year of our Lord one thousand eight hundred and sixty-two.

GEO. F. EMERY, *Clerk.*

5 *Officer's return.*

DISTRICT OF MAINE, *ss:* SEPTEMBER 8, A. D. 1862.

At five o'clock and fifteen minutes in the afternoon, by virtue of the within writ, I attached all the right, title, interest, estate, claim, and demand of every name and nature of the within-named Moses Macdonald, Harrison J. Libby, Levi Morrill, and Samuel Jordan, in and to all and any real estate in the county of Cumberland, in said district of Maine.

F. A. QUINBY,
U. S. Deputy Marshal, Dist. of Maine.

DISTRICT OF MAINE, *ss:* SEPTEMBER 10, A. D. 1862.

On this tenth day of December I filed in the office of the register of deeds, for the county of Cumberland, a true and attested copy of the above return,

together with the names of the parties to the writ, the date of the writ, the court to which the same is returnable, the sum sued for, the *ad damnum* in the writ; the value of the defendants' property which I am thereby commanded to attach, and a specification of the claim intended to be proved; and on the ninth day of said September, I delivered a summons in hand to the within-named Macdonald, Libby, Morrill, and Jordan, for their appearance at court.

F. A. QUINBY,
U. S. Dep. Marshal, Dist. of Maine.

Fees:	
4 services	$8 00
Travel 3 ms	18
Att. real est	71
	8 89

6 Maine district.—Circuit court of the United States, first circuit.

UNITED STATES OF AMERICA
vs.
MOSES MACDONALD *et als.*

And now the said defendants come and defend, &c., when and where, &c., and pray oyer of the writing obligatory declared upon and of the condition of the same, which is read in the words and figures following:

Know all men by these presents that we, Moses Macdonald, of Portland, in the county of Cumberland, and State of Maine, as principal, and Levi Morrill, Samuel Jordan, both of Westbrook, in said county, and Harrison J. Libby, of Portland, aforesaid, as sureties, are held and firmly bound unto the United States of America in the full and just sum of fifty thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this twenty-eighth day of January, in the year one thousand eight hundred and fifty-eight.

The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said Moses Macdonald to the office of collector of the customs for the district of Portland and Falmouth, in the State of Maine, now, therefore, if the said Moses Macdonald has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office according to law, then the above obligation to be void and of
7 none effect; otherwise, it shall abide and remain in full force and virtue.

And the said defendants say that the plaintiffs aforesaid ought not to have or maintain their action aforesaid against them, because they say that the said Moses Macdonald, from the time of his appointment to said office and, hitherto, ever since, has truly and faithfully executed and discharged all the duties of said office, according to law and according to the form and effect of said condition, to wit, at Portland aforesaid; and this they are ready to verify. Wherefore they pray judgment if the plaintiffs their action aforesaid ought to have or maintain, and for their costs.

By their attorneys, SHEPLEY & DANA.

UNITED STATES OF AMERICA,
Maine District, ss:

Circuit court of the United States for Maine district.

THE UNITED STATES
vs.
MOSES MACDONALD *et al.*

And the said United States, the plaintiffs in the above-entitled cause come into court, by George F. Talbot, attorney of the United States for said district of Maine, and say they ought not to be precluded from having and maintaining their action aforesaid by reason of anything in the said defendants' plea above pleaded, because they say that, after making the bond aforesaid, and during the time in which the said Moses Macdonald held the office of collector as aforesaid, to wit, on the sixteenth day of May, in the year of our Lord eighteen hundred and sixty-one, at Portland
8 aforesaid, the said Moses Macdonald had received of the money of the plaintiffs the sum of six thousand two hundred and eighty-one dollars, reported to be due to the said United States upon the adjustment and settlement of the account of the said Macdonald, as collector aforesaid in Treasury Department of the United States, for which sum the said Macdonald was then and there accountable to the United States aforesaid, and which said sum the said Macdonald then and there neglected and refused to pay into the treasury of the said United States; and the said Macdonald the said sum then and there eloined, and from the plaintiffs unjustly detained, and to the use of him, the said Macdonald, then and there converted and disposed. Whereof the plaintiffs afterwards, to wit, on the eighth day of September, in the year of our Lord eighteen hundred and sixty-two, at said Portland, gave notice to said Macdonald, and then and there required him to pay to the plaintiffs the sum of money aforesaid; and the said Macdonald then and there absolutely denied, and yet doth deny, to pay the plaintiffs the same; and this he is ready to verify. Wherefore the said United States pray judgment and their debt aforesaid, together with their damages by reason of the detention of that debt, to be adjudged to them.

The United States of America, by—

GEORGE F. TALBOT,
Attorney of the United States for Maine District.

9 And the said defendants say that, by anything in the replication aforesaid alleged, they, the plaintiffs, ought not to have or maintain their action aforesaid against them, because they say that the sum of six thousand two hundred and eighty-one dollars aforesaid accrued and was received, accounted for, and retained by said Moses Macdonald, by virtue of his office aforesaid, for storage of merchandise in bonded warehouses from January 20, A. D. 1858, to April 18, A. D. 1861, inclusive, as he lawfully might do; and this he is ready to verify.

Wherefore the defendants pray judgment of the plaintiffs, their action aforesaid thereof against them ought to have or maintain, and for their costs.

By their attorneys, SHEPLEY & DANA.

And the plaintiffs say that, by anything by the said Macdonald and others above in rejoining alleged, ought not to be barred from having their said action thereof against them, the said Macdonald and others, because they say that the plea aforesaid by the said Macdonald and others, in manner and form aforesaid above, in rejoining pleaded, and the matter in the same

contained, are not sufficient in law to bar the plaintiffs from having their said action thereof against the said Macdonald and others, to which the plaintiffs have no necessity, nor are bound by the law of the land in any manner, to answer; and this they are ready to verify.

10 Wherefore, for want of a sufficient rejoinder in their behalf, the plaintiffs pray judgment and their debt aforesaid, together with the damages on account of the detention of the said debt, to be adjudged to them.

The United States of America, by—

GEORGE F. TALBOT,
Attorney of said United States for Maine District.

And the defendants say that their said plea by way of rejoinder, and the matters therein contained, are sufficient in law to bar and preclude the plaintiffs from having or maintaining their action aforesaid against them.

Wherefore, inasmuch as the plaintiffs have not answered their rejoinder, nor in any manner denied the same, they pray judgment, and that the plaintiffs may be barred from having or maintaining their action aforesaid against them, and for their costs.

By their attorneys, SHEPLEY & DANA.

11 *Amendment of defendants' rejoinder to pl'ffs' replication, by leave.*

1st. By inserting, after the word "accounted for," the word *quarter-yearly.*

2d. By inserting, after the words and figures "from January 20, A. D. 1858, to April 18, 1861," inclusive, the words *not more than* $2,000 *in any one year.*

Filed by consent. GEO. F. TALBOT,
Att'y to the U. S.

United States circuit court, April term, 1864. M. Macdonald, defendant.

12 MAINE DISTRICT, *First Circuit, ss:*

At a term of the circuit court of the United States for the first circuit begun and holden at Portland, within and for said district of Maine, on the 23d day of April, in the year of our Lord one thousand eight hundred and sixty-four, to wit, on the twenty-third day of August of the same year, by adjournment.

Present: The Honorable Nathan Clifford, associate justice of the Supreme Court.

Declaration

The United States of America, plaintiffs, against Moses Macdonald and Harrison J. Libby, of Portland, and Levi Morrill and Samuel Jordan, of Westbrook, in our said district, defendants, in a plea of debt, for that the said defendants, at said Portland, on the twentieth day of January, in the year of our Lord eighteen hundred and fifty-eight, by their writing obligatory of that date, sealed with their seals, and here in court to be produced, dated the day and year last aforesaid, bound themselves unto said United States in the sum of fifty thousand dollars, to be paid to the said United States by said defendants on demand; yet, though requested, said defendants, or either of them, have not paid said sum, but owe and detain the same, to the damage of the said plaintiffs, as they say, the sum of fifty thousand dollars.

This action was entered at September term, in the year of our Lord one thousand eight hundred and sixty-two, and was thence continued to April

term, in the year of our Lord one thousand eight hundred and sixty-three, when the following pleadings are filed:

13 Maine district.—Circuit court of the United States, first circuit.

UNITED STATES OF AMERICA
vs.
MOSES MACDONALD *et al.* } Oyer and plea

And now the said defendants come and defend, &c., when and where, &c., and pray oyer of the writing obligatory declared upon and of the condition of the same, which is read in the words and figures following:

Know all men by these presents that we, Moses Macdonald, of Portland, in the county of Cumberland and State of Maine, as principal, and Levi Morrill and Samuel Jordan, both of Westbrook, in said county, and Harrison J. Libby, of Portland aforesaid, as sureties, are held and firmly bound unto the United States of America in the full and just sum of fifty thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-eighth day of January, in the year one thousand eight hundred and fifty-eight.

The condition of the foregoing obligation is such that whereas the President of the United States hath, pursuant to law, appointed the said Moses Macdonald to the office of collector of the customs for the district of Portland and Falmouth, in the State of Maine, now, therefore, if the said Moses Macdonald has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office according to law, then the above obligation to be void and of none

14 effect; otherwise, it shall abide and remain in full force and virtue.

And said defendants say that the plaintiffs aforesaid ought not to have or maintain their action aforesaid against them, because they say that the said Moses Macdonald, from the time of his appointment to said office, and hitherto ever since, has truly and faithfully executed and discharged all the duties of said office according to law, and according to the form and effect of said condition, to wit, at Portland aforesaid; and this they are ready to verify. Wherefore they pray judgment if the plaintiffs their action aforesaid ought to have or maintain, and for their costs.

By their attorneys,

SHEPLEY & DANA.

UNITED STATES OF AMERICA,
Maine District, ss:

Circuit court of the United States for Maine district.

THE UNITED STATES
vs.
MOSES MACDONALD *et als.* } Replication

And the said United States, the plaintiffs in the above-entitled cause, come into court by George F. Talbot, attorney of the United States for said district of Maine, and say they ought not to be precluded from having and maintaining their action aforesaid by reason of anything in the said defendants' plea above pleaded, because they say that after making the bond aforesaid, and during the time in which the said Moses Macdonald held the office of collector as aforesaid, to wit, on the sixteenth day of May, in the

year of our Lord eighteen hundred and sixty-one, at Portland aforesaid, the said Moses Macdonald had received of the money of the plaintiffs the sum of six thousand two hundred eighty-one dollars, reported to be due to the said United States upon the adjustment and settlement of the account of the said Macdonald as collector aforesaid in Treasury Department of the United States, for which said sum the said Macdonald was then and there accountable to the United States aforesaid, and which said sum the said Macdonald then and there neglected and refused to pay into the treasury of the said United States; and the said Macdonald the said sum then and there eloined, and from the plaintiffs unjustly detained, and to the use of him, the said Macdonald, then and there converted and disposed. Whereof, the plaintiffs afterwards, to wit, on the eighth day of September, in the year of our Lord eighteen hundred and sixty-two, at said Portland, gave notice to said Macdonald and then and there required him to pay to the plaintiffs the sum of money aforesaid; and the said Macdonald then and there absolutely denied, and yet doth deny, to pay the plantiffs the same; and this he is ready to verify.

Wherefore, the said United States pray judgment and their debt aforesaid, together with their damages by reason of the detention of that debt, to be adjudged to them.

The United States of America, by—

GEORGE F. TALBOT,
Attorney of the United States for Maine District.

Rejoinder

And the said defendants say that, by anything in the replication aforesaid alleged, they, the plaintiffs, ought not to have or maintain their action aforesaid against them, because they say that the sum of six thousand two hundred and eighty-one dollars aforesaid accrued and was received, accounted for and retained, by said Moses Macdonald by virtue of his office aforesaid for storage of merchandise in bonded warehouses from January 20, A. D. 1858, to April 18, A. D. 1861, inclusive, as he lawfully might do; and this he is ready to verify.

quarter's pay not more than 2000 in any one year

Wherefore, the defendants pray judgment of the plaintiffs their action aforesaid thereof against them ought to have or maintain and for their costs.

By their attorneys,

SHEPLEY & DANA.

Demurrer & Rejoinder

And the plaintiffs say that by anything by the said Macdonald and others above, in rejoining, alleged, ought not to be barred from having their said action thereof against them, the said Macdonald and others, because they say that the plea aforesaid by the said Macdonald and others in manner and form aforesaid above, in rejoining, pleaded, and the matter in the same contained, are not sufficient in law to bar the plaintiffs from having their said action thereof against the said Macdonald and others to which the plaintiffs have no necessity nor are bound by the law of the land in any manner to answer; and this they are ready to verify. Wherefore, for want of a sufficient rejoinder in this behalf, the plaintiffs pray judgment and their debt aforesaid, together with the damages on account of the detention of the said debt, to be adjudged to them.

The United States of America, by—

GEORGE F. TALBOT,
Attorney of said United States for Maine District.

Joinder & Demurrer

And the defendants say that their said plea by way of rejoinder, and the

matter, therein contained, are sufficient in law to bar and preclude the plaintiffs from having or maintaining their action aforesaid against them.

Wherefore, inasmuch as the plaintiffs have not answered their rejoinder, nor in any manner denied the same, they pray judgment, and that the plaintiffs may be barred from having or maintaining their action aforesaid against them, and for their costs.

By their attorneys,

SHEPLEY & DANA.

Said cause was thence continued from term to term until April term in the year of our Lord one thousand eight hundred and sixty-four, when the pleadings are amended as follows, to wit :

Amendment to defendants' rejoinder to plaintiffs' replication, by leave.

1st. By inserting after the word "accounted for" the word *quarter yearly.*

2d. By inserting after the words and figures "from January 20, A. D. 1858, to April 18, 1861, inclusive," the words *not more than* $2,000 *in any one year.*

18 Filed by consent.

GEO. F. TALBOT,
Att'y to the United States.

United States circuit court, April term, 1864. M. Macdonald, def't.

Whereupon, said cause is argued by George F. Talbot, esq., United States attorney, in behalf of the United States, and by Moses Macdonald, esquire, in behalf of the defendants, and the same is held by the court for advisement until this twenty-third day of August aforesaid. All which being seen and understood, it is therefore considered by the court here that the demurrer aforesaid be, and the same is hereby, overruled ; that the rejoinder aforesaid be, and the same is hereby, adjudged good. And it is further considered by the court here that the said United States take nothing by their writ aforesaid.

Attest : GEO. F. EMERY, *Clerk.*

Recorded from the original papers and minutes, by—
GEORGE F. EMERY, *Clerk.*

Filed October 27, 1864.

SUPREME COURT OF THE UNITED STATES.

No. 89

THE UNITED STATES, Plaintiff in Error,

vs.

MOSES MACDONALD, LEVI MORRILL, SAMUEL JORDAN, and HARRISON J. LIBBY, Defendants in Error.

In Error to the Circuit Court of the United States for the District of Maine.

STATEMENT AND BRIEF

OF

WILLIAM P. FESSENDEN, ATTORNEY FOR MOSES MACDONALD & ALS., DEFENDANTS IN ERROR.

PORTLAND, MAINE:

KING & RICH, PRINTERS.

1865.

SUPREME COURT OF THE UNITED STATES.

No.

THE UNITED STATES, Plaintiff in Error,

vs.

MOSES MACDONALD, LEVI MORRILL, SAMUEL JORDAN, and HARRISON J. LIBBY, Defendants in Error.

In Error to the Circuit Court of the United States for the District of Maine.

STATEMENT AND BRIEF

OF

WILLIAM P. FESSENDEN, ATTORNEY FOR MOSES MACDONALD & ALS., DEFENDANTS IN ERROR.

PORTLAND, MAINE:
KING & RICH, PRINTERS.
1865.

STATEMENT AND BRIEF.

The pleadings present the question in issue. The action is debt by the United States upon the official bond of one of the defendants, as collector of customs for the District of Portland and Falmouth. The defendants crave oyer of the bond, and plead *performance.* The plaintiffs deny performance, and assign for breach of bond—the neglect and failure of the collector to pay over to the United States the sum of six thousand, two hundred and eighty-one dollars. The defendants reply, that "the plaintiffs ought not to have and maintain the action aforesaid against them, because they say that the sum of six thousand, two hundred and eighty-one dollars aforesaid, *accrued,* was received, accounted for quarter-yearly, and retained by the said Moses Macdonald, by virtue of his office aforesaid, for *storage* of merchandise in bonded warehouses, (from January 20, 1858, to April 18, 1861, inclusive—*not more than two thousand dollars* in any one year,) as he lawfully might," &c. The plaintiffs demur to this replication, denying its sufficiency in law to justify the retention of the money in controversy. The pleadings in the case admit *the fact,* that the money claimed by the government was received, and is retained as *storage.*

The question for determination is, whether the receipts for storage of merchandise in bonded warehouses are liable to contribute the additional compensation to collectors, provided and prescribed in the fifth section of the act of March 3rd, 1841.

I. Collectors may retain sums of money, not exceeding the amount fixed by law, received for the storage of merchandise in private bonded warehouses—making the annual compensation for the non-enumerated ports five thousand dollars, ac-

cording to the state of the importations and the amount received from rent and storage. The act of 7th of May, 1822, (*Stat. at Large, vol.* 3, *p.* 693,) limits the pay of collectors (from "*fees and emoluments*") at the enumerated ports, to four thousand dollars per year; at the non-enumerated ports, to three thousand per year.—(Sections 9 and 10.)

This compensation remained without material change, from 1822 until the act of 3rd of March, 1841.—(5 Stat. at Large, p. 422.) By the fifth section of this act, "*every collector*" is required to include in his quarter-yearly accounts, among other things, all sums received by him for rents and storage of goods, wares and merchandise stored in the public storehouses, for which a rent is paid beyond the rents paid by the collector.

In the case *U. S. v. Walker*, (22 How., 313,) the Court decided, that when the sums so received for rent and storage did not, in the aggregate, exceed two thousand dollars per year, "the collector might retain the whole amount to his own use;" "and in no case was he required to pay into the Treasury anything but the excess beyond the two thousand dollars."

Portland being one of the non-enumerated ports, the collector's compensation may be three thousand dollars per year from the sources of emoluments allowed by law of 1822; and *in addition thereto*, he is (*under this decision*) entitled to whatever sum or sums he may receive for rent and storage, provided the amount does not exceed two thousand dollars in any one year; and in no case is he required to pay into the Treasury anything but the "excess" beyond that sum, as *part* and *parcel* of the *public money*.

II. The history and circumstances of the passage of the act of the third of March, 1841, justifies and sustains this construction of its intent and meaning. There being no law requiring collectors to account for receipts for storage, they retained whatever sum was not required to pay the rent of the occupied stores, to their own use, and it went to swell the amount of their annual compensation. "To correct that supposed *abuse, the act of the third of March*, 1841, *was passed.*"

III. The occasion and end in view, of this enactment, was to secure an account from *every collector* of the "profits" from custom-house storage. Its provisions in this behalf, imply and affirm, that collectors have been, now are, and are still to be, the recipients of such profits.

IV. Whether receipts from custom-house storage are received from stores occupied under existing or newly-enacted laws, the account is required, the two thousand dollars annually allowed to the collector *attaches*, and the payment of the excess into the Treasury, as part of the public money, is imperative.

In the case *U. S. v. Walker*, (22 How., 299,) the storage was received under the Warehouse Acts of 1846, and the Court directed the account adjusted, and settlement to be made on these principles.

V. This construction of the law of 1841, is necessary, not only to meet the supposed abuse, but unless it is adopted, Congress failed to accomplish its object, viz: to compel an account for storage "HERETOFORE" retained by collectors to ther own use. If all storage received by collectors, under laws existing before its passage, is to be accounted for, storage received under subsequent laws should be, upon the principle "if a thing contained in a subsequent Statute, be within the reason of a former Statute, it shall be taken to be within the meaning of that Statute."

VI. There is nothing in the language of the fifth section of the act of March 3, 1841, which requires a construction different from the plain intention of Congress, or justifies its limitation to rented stores. It directs, "that every collector shall render a quarter-yearly account under oath," &c., of all sums of money received "for rents and storage of goods," &c., "*which may be stored in the public storehouses*, and for which a rent is paid, beyond the rent paid by the collector." *The end in view*, was to require an *account* for rent and stor-

age of goods, &c., *which* may be stored in the public store-houses—that is, merchandise in the course of importation, "beyond the rents paid," &c.,—that is, *an account* for the profits of custom-house storage. If no rent was paid by the collector, as would be the case where the stores were owned by the United States, or under the Warehouse Acts of 1854, in case of "bonded stores," approved by the Secretary of the Treasury, the amount of their profits would be increased—as no deductions would be made.

It is conceded, that all storage received from the newly rented stores must be accounted for by collectors, in pursuance to the fifth section of the law of 1841. Limiting its provisions in this manner, making a condition precedent to the account —therein required, by confining it to the new rented stores— the purpose of Congress is defeated, the design of the law subverted, and a sound rule for the construction of Statutes disregarded; "as provisions of a law which are merely directory are not to be construed into conditions precedent." To answer its design, the law must apply to all receipts for storage under the different acts relating to merchandise in the course of importation.

VII. As the paramount intent of the law is to compel and secure an account of storage received on merchandise while in the custody and under the control of collectors, in course of *importation*, all storage, wherever and whenever received, must be accounted for in obedience to its requirements.

VIII. Under this construction, the mischief sought to be remedied is completely met; for the enactment having relation to merchandise allowed by law to be deposited in the public stores, is not only prospective but retrospective. The receipts of money, for the care and custody of duty-paying importations, under laws passed anterior or subsequent (by a liberal construction, which is allowed to effect the object of a Statute,) may properly be settled in accordance to its provisions.

IX. The act of third of March, 1841, was not passed to provide or prescribe the mode in which importations were to be deposited in public warehouses. The Statutes in relation to the custody and control of "duty-paying merchandise," by the several collectors of the United States, anterior and subsequent to this act, are as follows, viz:

1. GENERAL STORAGE—or the custody of merchandise without entry, was the duty of collectors in case of incomplete entry, or "damaged goods," at expense of importer.
   1 Stat. at Large, 665, act March 2, 1799, sec. 52.
   3 " " " 730, " " 1, 1823, " 3.
2. SPECIAL STORAGE—or the custody and control of merchandise under an entry or by agreement, was provided in case of Teas, Wines and Wool, viz:
   Teas—Act March 2, 1799, section 62, (now repealed.)
   Wines, &c.—3 Statute at Large, p. 469.
   Wool—4 Statute at Large, p. 591.

X. Both general and special storage are now provided for under the Warehouse Laws of 1846 and 1854, which make new and more enlarged provisions for storing foreign goods—allowing to all merchandise not excepted from the privilege, an entry for warehouse, which previously was confined to wines, distilled spirits and wool.

XI. INSTRUCTIONS of the Treasury Department require collectors to account quarter-yearly for all sums received as storage, whether the merchandise was warehoused in the stores held under lease or in bonded warehouses, or in other storehouses authorized to be used for that purpose, as depositories of imported dutiable merchandise.—Vide *Clark vs. Peaslee.*

XII. Statutes in *pari materia* should be taken into consideration in construing a law. If a thing contained in a

subsequent Statute be within the reason of a former Statute, it shall be taken to be within the meaning of that Statute. The meaning of the legislature may be extended beyond the precise *words* of the law, from the *reason* or *motive* on which the legislature proceeded—from the end in view, or the purpose designed.—*United States vs. Freeman,* 3 How., 556.

XIII. "In the interpretation of the Revenue Laws, great weight is given to the practice of the government under them as the contemporaneous construction of their intent and meaning. Since 1841, six thousand dollars has been allowed as the compensation of collectors for the enumerated ports. As this sum covers the four thousand dollars prescribed as their maximum, under the law of May 7, 1822, together with the two thousand dollars for storage, it conclusively proves that the accounting officers of the Treasury Department have recognized the fifth section of the act of 1841 as applicable to all money received for storage.

XIV. This allowance, since the passage of the Warehouse Law, involves and admits the ground maintained in the defense, viz: "that payments by the occupant of bonded stores, under the Warehouse Acts, *are storage* within the intent and meaning of the fifth section of the act of third March, 1841.

XV. The public stores formerly rented by the United States for the purpose of storing foreign goods, were discontinued by the seventh section of the law of 1854.

XVI. Custom-house storage, or warehousing, is provided for under this law, by substituting "*bonded warehouses*" for the stores previously rented by the collectors "on public account,"—the leases of which had long before expired.

XVII. The Warehouse Act of 1846 contains an express declaration that private *bonded* warehouses are *public stores.* In the first section of this act, after provision has been

made for depositing goods &c. in public stores, or in other stores to be agreed upon by the collector and importer, to be kept at the charge and risk of the latter, and subject to the payment by him of "proper duties and expenses," and to be secured by bond &c.; or, in other words, after providing for private bonded warehouses as the legal depositories of goods imported &c., the following language occurs: "And in case any goods, wares, or merchandise, deposited *as aforesaid*, shall *remain* in PUBLIC STORE beyond one year," &c. The second section of said act commences as follows: "And be it further enacted, that any goods when deposited in the PUBLIC STORES *in the manner provided for in the foregoing section*," &c.

Thus public and private bonded warehouses are treated alike as *public stores* — all government warehouses are necessarily "public storehouses." The government lock is never put on a private store. When a private warehouse is *bonded* and government takes possession or control of it as a depository of goods imported and warehoused, and puts its own lock on it, it becomes necessarily a "public storehouse." "Public storehouse" is the general term, while "public warehouses" and "private bonded warehouses" are the terms by which different classes or varieties of the same thing are, for the sake of convenience, designated.

XVIII. The following provisions contained in the Warehouse Act of 1854, plainly interpret its meaning, and are equivalent to the legislative declaration, "that private bonded warehouses are public stores."

By the second section of this act "all charges for storage," &c., on cargo taken possession of by collectors, stored in any private bonded warehouse, are required to be paid by the claimant in the same manner as though the merchandise had been stored in any warehouse, owned or leased by the United States.

This section also provides for the sale, at public action, of unclaimed goods stored in any public warehouse, or in a private

bonded warehouse, when liable in the opinion of the collector to depreciation in value. *Whether such merchandise* is stored in a store *owned* or *rented* by the United States, or in a *private bonded warehouse*, the place of its *deposit* is referred to as a "public warehouse," and the place of its *remaining* is described as a "public store."

XIX. Private bonded warehouses were decided to be public stores by the Circuit Court in *Clark v. Peaslee*, Mass. Dist., Oct. Term, 1862. Half storage had been demanded by the collector in that case, and the same had been paid by the merchant under protest, suit being brought to recover back the money; in deciding the question, the reasoning of the court keeps constantly in view the governmental and public character of the private bonded warehouse. The merchant might justly have complained of the exaction of half storage for the occupancy of *his own store*, but for the governmental or public character conferred upon tt under the provisions of law. This was the equivalent received by the merchant, and this was the occasion and justification of the government for demanding and retaining the storage.

XX. The opinion of the Court (herewith submitted) most elaborately reviews and examines the different *acts of Congress* relating to the warehousing of imported goods and the principal Regulations and Circulars of the Treasury Department upon the same subject. It conclusively shows that a *bonded store*, both in law and fact, is a *public store*. Its creation, its regulation, its custody and its use are all public and governmental.

Under the old system collectors exercised their own discretion in the leasing of stores for deposit of importations.—Under the new, before any store can be bonded, application to the Secretary of the Treasury is necessary and his approval required. In passing upon the application of a party to have his building accepted for a bonded warehouse the question for decision, was not personal profit or convenience, but whether

the public interest will be subserved. These bonded stores are subject, as to rates for storage, to regulations by the Secretary of the Treasury. No importations can be deposited before the store is duly constituted a "*bonded warehouse.*" The store must be secured by government locks and be in the care of a government officer. If their contents are destroyed by fire, there is legal provision for the remission of the duties charged against them on the customs books.

XXI. The Warehouse Act of 1854 relieves the government from payment of rent for stores occupied by the merchandise in the course of importation while it increases the duties of collectors beyond those required by laws existing before its passage.

XXII. If the money in controversy had been received by the collector from "rented stores," or under laws existing anterior to 1841, his right to retain it as additional compensation is not controverted.

The following words in section fifth, of the act of 1841—"or for rent and storage of goods, wares and merchandise, which may be stored in the public storehouses, and for which a rent is paid, beyond the rents paid by the collector or other such officer,"—must be construed as if they read, "or for rent and storage of goods, wares and merchandise which may be stored in the public storehouses; and in cases where a rent is paid by the collector or other such officer, for all sums received beyond the rent so paid." The words, "for which," in the above quotation, were erroneously used, instead of "where." This is the only reasonable construction, and it alone can secure the object of Congress. Interpreted as the provision is above, the collector is to account under the first clause, generally, for rent and storage; and this liability secures an accounting in cases of stores owned by the United States, and where, for any reason, no rent has been paid by the collector: in such cases he must account for his entire receipts; but by the second clause, in cases where he has paid out rent, he is to

account only for the excess received beyond the sums paid out. By any other construction, the collector is under no obligation to account for rent and storage *in cases where rent has not been paid.* The specification of liability to account for one kind of rent and storage, excludes the idea of liability to account for any other—*expressio unius exclusio est alterius.* And besides, how easy it would be for the collector, if disposed to enlarge his salary by abusing his opportunities, to arrange matters so as *to pay no rent for stores,* and thus avoid all liability whatever to account for rents and storage! Can it be supposed that Congress, in endeavoring to correct an abuse, furnished facilities for its enlargement? That, instead of putting up the bars, it threw the entire fence down? The plaintiffs' construction makes it the collector's duty to account for only such storage as is in excess of rents paid. It makes the payment of rent the condition of responsibility on the part of the collector or other officer.

The defendants' interpretation makes the collector liable to account for all sums received by him for storage, or in place of storage, or as "fees for storage."

It is suggested, that both the wisdom and policy of Congress will be difficult to comprehend, if laws authorizing the collection of storage, are to be so construed, that in cases in which the government pays rent on the stores occupied—the storage receipts are made liable to contribute additional compensation to collectors, (their duties being less;) but in cases where the storage is received without expense to the Treasury, no additional compensation is allowed to collectors, although their duties are increased.

XXIII. *The unreasonableness of such construction is sufficient for its refutation and rejection.*

XXIV. The issue joined, is upon the sufficiency in law of the fact before the Court to bar the maintenance of this action. The money in controversy is defined by the defendant, and admitted by the plaintiffs to be storage.

XXV. It accrued as storage—it was received as storage—it was accounted for as storage—and it is retained by the collector as storage.

XXVI. If this money was storage, and was received for storage in "public storehouses," (as it cannot be denied it was,) it is a legitimate element of compensation to the collector to the extent of two thousand dollars per annum, if earned; otherwise HE IS NOT BOUND TO INCLUDE IT IN HIS ACCOUNT; for he may deduct his two thousand dollars *from whatever sum or fund* he is bound to account for as storage. It is only after a deduction of two thousand dollars from "SUCH ACCOUNTING," that he is liable to pay any excess.

It was legally collected as *storage*, as has been decided in *Clark vs. Peaslee.*

XXVII. As the act of third of March, 1841, made provision both for compensation and accountability of collectors for storage on merchandise in course of importation—neither of the Warehouse Acts contain any provision in this particular—Congress has passed no subsequent law on the subject.

When the object of the law of 1841 is considered, it appears that there was no occasion for such provision. As the object of this law was to limit the compensation of collectors, derived from rents and storage, to two thousand dollars per annum, and to fix the maximum salaries of certain officers, it cannot be doubted that it was the intention of Congress, that, from any sources yielding storage, or a balance of storage, or money in the lieu of storage, the collector might deduct his maximum of two thousand dollars. Any other interpretation would be in denial of the very end of the law of 1841; and it cannot be supposed, that if Congress, in 1854, had not understood this law as attaching to the monies to be received under the act of the latter year as storage, or half-storage, or expenses, it would have omitted to make provision for keeping up, in 1854, the compensation of collectors, of the large ports especially, to what it was in 1841. In 1854, the duties and responsibilities

of collectors in the principal ports were more than double what they were in 1841—a large portion of this increase being occasioned by this system of warehousing goods; and not only were the labors and cares of collectors augmented during this time, but all other salaries in the country, owing to the increased cost of living after the acquisition of California, were increased. Can it be believed, that it was the purpose of Congress at this time to reduce the salaries of collectors thirty-three per cent? The views above expressed, of the meaning of the act of 1841, are sustained by a careful examination of the provision fixing the maximum compensation of collectors, naval officers and surveyors.

By this act, from all sources of income, including "*fees for storage*," collectors may receive in the aggregate a compensation not exceeding six thousand dollars per annum. This term—"fees for storage"—in this connection, aids in the interpretation of the law. It enlarges the specific language before used, and is broad enough to cover, and was evidently intended to cover, any future provision in respect to storage, so far as it might affect the question of compensation. There might be new laws in this regard, and they might make changes in the rates of storage, the manner or form of its collection, as they have, and what term could be more fit to cover the claim of the collector to his compensation out of such receipts, than the one here employed—"fees for storage?"

If these receipts are to be regarded, as plaintiffs' counsel maintains they should, as "expenses," or as fees for an officer attending, how perfectly are they included in the term "*fees* for storage!" How pertinent is this phrase to embrace any and all similar receipts!

XXVIII. Congress limits the expenses for collecting the revenue, in March, 1849, to $1,560,000 per year, "together *with all sums paid for storage*," &c.—9 Stat. at Large, p. 398.

In 1858, an appropriation is made of a certain sum for the expense of collecting the revenue from customs, together "*with*

such sums as may be received from storage, cartage," &c.—11 Stat. at Large, p. 337.

The Warehouse Law of 1846 was put into operation by the Treasury Circular of February 17, 1849.

The Warehouse Law of 1854 is now in operation, under the General Instructions of the Secretary of the Treasury, of February 1st, 1857.

The above cited Statutes were passed immediately after the issuance of these Instructions. They clearly show, that Congress anticipated "that storage, as such, in bonded or private stores authorized by the Warehouse Acts, would be exacted and received from the owner of warehoused goods."

XXIX. Since the discontinuance of rented stores, the payments by the occupants of bonded or private warehouses is the only storage received on foreign goods in the course of importation.

XXX. Unless this storage contributes additional compensation to collectors, under the act of third of March, 1841, the following consequences are inevitable:

1. The pay of every collector is reduced two thousand dollars.

2. The judgment in *United States vs. Walker*, (22 How., 313,) was erroneous.

3. Private bonded warehouses are "not public storehouses," although they are expressly declared to be such in the acts of 1846 and 1854.

4. There is no law for the settlement of storage collected under the existing Warehouse Acts.

5. The Instructions of the Treasury Department, are contrary to law.

6. The compensation allowed the collectors of the enumerated ports, since 1854—viz: six thousand dollars per year—is without authority of law.

7. While the pay of other government officers has been increased, that of collectors has been reduced.

8. That the only provision of law for the compensation of collectors, is under the act of seventh of May, 1822.

ADDENDUM.

The following propositions and remarks are submitted as conclusive upon the question, whether receipts for storage in Bonded Warehouses are liable to contribute additional compensation to Collectors under the fifth section of the act of March 3d, 1841:

1st. The 5th section of the Warehouse Act of 1846, 9 Stat. at Large, p. 55, is in these words: "That the Secretary of the Treasury be, and is hereby authorized to make, from time to time, such regulations, not inconsistent with the laws of the United States, as may be necessary to give full effect to the provisions of this act, and secure a just accountability under the same.

Under this authority the Secretary issued the Extended Circular of February 17, 1849, in the place of all Warehouse Regulations *"heretofore issued."*

2d. The 9th section of the Warehouse Act of 1854, 10 Stat. at Large, p. 273, is in these words: "That the Secretary of the Treasury be, and is hereby, authorized from time to time to establish such rules and regulations, not inconsistent with the laws of the United States, for the due execution of this act, as he may deem to be expedient and necessary; and all acts and parts of acts conflicting with this are hereby repealed." Under this authority the Secretary of the Treasury issued a Circular on March 30th, 1854, which adopts and continues in force the Treasury Regulations of 1849, in all respects, (unless modified by the provisions of the Warehouse Act of 1854) until the same are modified or revoked by further instruction.—*Ogden's Treas. Cir. & Decs., page* 63.

3d. The 34th section of the Treasury Circular of February 17, 1849, is in these words: "All moneys received by Collectors from owners or occupants of private Bonded Warehouses, in payment for half storage, or for the use of an Inspector in attendance at the premises, *will be accounted for as receipts for storage* in their accounts with this Department."—*Ogden's Treas. Cir. & Decs., page* 132.

This provision has never been *modified* or *revoked*, and from the time of its promulgation has been in force *as law*. Under it all moneys received by Collectors for the occupancy of "private Bonded Warehouses was to be accounted in the same manner as money received by them "*for rent and storage of goods, wares, or merchandize which may be stored in the Public Storehouses, and for which a rent is paid beyond the rents paid by the Collector*," &c.

4th. As all accounting for "storage receipts" at the Treasury was under the provisions of the 5th section of the act of March 3d, 1841—that being the only law in that behalf—the legal effect upon Collectors and the Government of this 34th section is the same as though this 5th section had been set out in words or copied into the Circular of 1849. In the Walker case this law of 1841 received a judical construction, *viz*: "And if from such accounting the sums received in one year exceed $2,000, the Collector is required to pay the *excess* into the Treasury; but when the sums do not exceed $2,000, the Collector may retain the whole to his own use, and in no case is he required to pay into the Treasury anything but the excess. It is thus shown that under Treasury Circular of February 17th, 1849, (having the force of law,) the additional compesation from storage, prescribed for Collectors under the 5th section of the act of March 3d, 1841, is amply and clearly provided for. Since the General Regulations of February 1st, 1857, were issued, the Treasury Department has expressly recognized the Circular of 1849 in relation to half storage, as in force and applicable to the Warehouse Act of 1854.

The impression prevailed, in some quarters, that the occupants of private bonded stores were required to pay, in all cases, for that privilege, a sum equivalent to the pay of an Inspector placed in charge, *and had no right, at the time of placing the goods in store, of determining to pay "half storage."* This provision of the Circular of February, 1849, was said to be repealed by the Instructions of February, 1857. Vide Clark v. Peaslee.

In communicating to Collectors, the Treasury Circular of June 30, 1857, "the occasion is taken to subjoin for their information and government, an abstract of decisions, together with instructions since 1st of February" then last past.

Article 44 of this Circular is as follows:

"It has been decided, that in cases where goods are stored under bond in a private store, the importer shall either make monthly payment of a sum equivalent to the pay of an Inspector placed in charge

of the same, or one-half of the amount which would accrue as storage on the goods so stored, if placed in public store; the importer to make his selection at the time of placing the goods in store."

This "decision" is consistent, and sustained by the provisions of the General Regulations "that all former instructions and regulations" are only rescinded so far as they are in conflict or inconsistent with the Instructions and Regulations of February 1st, 1857.

5th. The last clause of section forty of an act entitled "An Act further to prevent smuggling and for other purposes," approved July 18, 1866, *declares*, that "all money received by Collectors for the custody of goods, wares, and merchandize in Bonded Warehouses, shall be accounted for as storage under the provisions of the fifth section of the act of March third, eighteen hundred and forty-one." By this enactment all moneys in the hands of Collectors for the care and custody of goods in Bonded Warehouses, shall be accounted for in the same manner as money received by them for rents and storage of goods, wares, &c., stored in the public storehouses, &c.

This statute is merely declaratory of existing law, as it neither changes or makes new provisions in this particular. The evident purpose of Congress was to put an end to the controversy whether receipts from Bonded Warehouses were liable to contribute the additional compensation provided for Collectors in the law of 1841. After the decision in the case of United States vs. Walker, by which the compensation of Collectors from "fees and emoluments" was decided to be limited to the maximum named in the law of May 7th, 1822, and rented stores, except for the use of appraisers being discontinued, under the Warehouse Act of 1854, which provided for Custom House storage, by substituting "Bonded Warehouses" for the stores previously rented for that purpose; *the accounting officers of the Treasury Department* declined to allow the Collectors any benefit from moneys received from Custom House storage, for the reason that it was not received from "a rented store"--the Government paying no rent, therefore the Collectors should receive no pay for their services. Rents being paid for the stores, similar services were entitled to compensation.

The first part of the fortieth section of the act of July 18, 1866, provides for further penalties for the breach of the law of 1849, that all moneys received for the use of the United States, (that is, public money,) shall be paid into the Treasury in the gross amount and without abatement of any kind. But to negative the conclusion that the law of 1849 ap-

plied to receipts for storage, they expressly declare and direct, in the last clause of this section, that such receipts shall be accounted for under the law of 1841, which had received a judicial construction by the Supreme Court, "*that only the excess beyond* $2,000 was part and parcel of the *public money*, and liable to be paid into the Treasury without any abatement. United States v. Pearce & als., 2 Sum., 575.

6th. The first provision of this fortieth section is penal, and is, therefore, to be construed strictly—the last clause is remedial, and being of this character, is entitled to a liberal construction.

Under a strict construction, the first clause will be limited in its application by its express language and clear implications. Under a liberal construction, the last clause should be extended and its meaning inferred, "from the reason or motive on which the legislature proceeded—from the end in view or the purpose designed." Depriving Collectors of the additional compensation derived from Custom-House storage under the Act of 1841, operated to reduce their salaries thirty-three per cent., while all other salaries in the country, owing to the increased cost of living, were being increased. To remedy this injustice was the end in view and the purpose designed by Congress in the passage of this declaratory and remedial law. The provision being remedial, must be regarded as both retrospective and prospective. If it is construed to be only prospective, then its passage by Congress is an admission that there was no law requiring an account for the collections heretofore made; but regarding it as restrospective as well as prospective, it is accepted and made operative as *the existing law*, promulgated by the Supreme Court of the United States, and under which it directed the charges against the defendant in the Walker case to be settled.

The adoption by Congress of the construction given by the Courts to the Act of March third, 1841, sanctions that construction, and makes it irreversible without it is repealed. Applying this law, expounded by the Court, and sanctioned by Congress, to the question submitted for decision, *viz:* Whether the receipts for storage of merchandize in Bonded Warehouses are liable to contribute the additional compensation to Collectors, provided and prescribed in the fifth section of the Act of March third, 1841, the Judgment of the Circuit Court should be confirmed.

Supreme Court of the United States.

DECEMBER TERM, 1866.

No. 89.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

MOSES McDONALD ET ALS.

Brief of Defendants in Error.

I.

The single question presented by the pleadings, is, whether the defendant, McDonald, is entitled to retain a sum not exceeding two thousand dollars per annum, as collector, from his receipts for storage, under all the acts upon that subject.

The plea — page 3.
Replication — page 4.
Rejoinder — page 4.
Amendment — page 5.
Demurrer — page 4–5.

II.

This question is sufficiently and properly presented.

V. Pleadings, before cited.
Treasury instructions of February 7, 1849.
Opinion of Justice Clifford in this case.
Act of 1841, sec. 5, 5 Stat., 422.
Clark vs. Peaslee, Mass. District.

III.

This specific question has been decided by this court in relation to all acts passed previous to September 7, 1850.

U. S. vs. Walker, 22 Howard, 299.

IV.

The amount received by defendant, McDonald, was technically *storage*, and has been so regarded by uniform practice of department in settling accounts of collectors, by department instructions, and by legal decision.

Clark vs. Peaslee, before cited.
Instructions.

V.

Private bonded warehouses are expressly recognized as *public stores* by "the warehouse acts" of 1846 and 1854.

Act 1846, secs. 1 and 2.
Act 1854, sec. 2.
Clark vs. Peaslee, before cited.

VI.

Congress has removed all doubt on the true construction of the act of March 3, 1841, and the effect of subsequent acts upon the question of storage, by an act approved July 18, 1866, sec. 40, entitled "An act further to prevent smuggling, and for other purposes."

This act must be regarded as declaratory of the existing law, and, being remedial, should be liberally construed as covering all accounts of collectors for storage.

U. S. vs. Fenmore, 3 Howard, 556.

W. P. FESSENDEN,
for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

December Term, 1866.

UNITED STATES
vs.
MOSES MACDONALD ET AL. } No. 89.

IN ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF MAINE.

BRIEF OF UNITED STATES.

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Assistant Attorney General.

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1866.

UNITED STATES
vs.
MOSES MACDONALD ET AL. } No. 89.

THE CASE.

This is a writ of error to a judgment rendered in the Circuit Court of the United States for the district of Maine, in an action instituted against the principal and sureties in the official bond of Moses Macdonald, as collector of customs at Portland, for the recovery of $6,281 reported to be due the United States on the adjustment of his accounts, and which he had refused to pay into the Treasury. (Rec., p. 4.) The rejoinder of the defendants alleged that Macdonald received, accounted for quarter-yearly, and retained this sum, by virtue of his office, for storage of merchandise in bonded warehouses from January 20, 1858, to April 18, 1861, inclusive, not more than $2,000 in any one year. Rec.,) p. 4, 5.) The United States demurred, and issue being joined the court adjudged the rejoinder good, and gave judgment for the defendants.

QUESTION RAISED BY THE PLEADINGS.

The question presented for decision is mainly one touching the true construction and effect of section 5 of the act of March 3, 1841. It is whether, under and by virtue of that act, a collector of customs may retain, as compensation or emolument, any portion of the moneys which may accrue from the storing or custody of imported merchandise in private bonded warehouses?

The act provides (section 5) that in addition to the account required to be rendered by every collector, every collector shall render a quarter-yearly account to the Secretary of the Treasury, of all sums of money received or collected "for *rent and storage of goods, wares, or merchandise which may be stored in the public storehouses, and for which a rent is paid beyond the rents paid by the collector;* and if from such account-[illegible] it shall appear that the money so received in any one year by any

collector, on account and for *rents and storage* as aforesaid, shall in the aggregate exceed the sum of two thousand dollars, such excess shall be paid into the Treasury of the United States, as part and parcel of the public money; and no such collector shall, on any pretence whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than six thousand dollars per year, including all commissions for duties, and all *fees for storage*, or fees or emoluments, or any other commissions or salaries which are now allowed and limited by law." (5 *Stats. at Large*, 432.)

In contesting the right of the defendant collector in this suit, under authority of the act of 1841, or any other statute, to retain any portion of the money received by him, in his official capacity, on account of the storing of goods in private bonded warehouses, we submit, on behalf of the United States, the following propositions and remarks in their support:

FIRST POINT.

Before the passage of the act of 1841, all moneys received by collectors of customs as storage, or expenses, for or on account of merchandise stored in the public, or in other than the public, stores, belonged, and were of right payable, to the United States as part of their public money; and the said collectors had no right or power in law to retain, or appropriate, the same as perquisites, emoluments, or allowances of their office.

1. At the time of, and prior to, the passage of the act of March 3, 1841, there were two statutes in force authorizing the bonding and warehousing, without payment of duty on their first entering, of a limited class of imported merchandise. They were the act of April 20, 1818, permitting *wines* and *distilled spirits*, where the duties were secured by bond without surety, to be deposited, for twelve months, in the *public* or *other storehouses*, and the act of July 14, 1832, section 6, which allowed wool and manufactures of wool to be warehoused in the *public stores* for a period not exceeding six months. (3 *Stats.*, 469; 4 *Stats.*, 591.) Thus, two classes of stores, used for warehousing purposes, were described by the legislation anterior to the statute of 1841, namely, the public and other than public stores. The latter stores were author-

ized to be used, at the election of importers and the inspectors, only in the case of the bonding of wines and distilled spirits. Wool and woollen manufactures were required to be detained, under bond, in the public stores.

2. In the case of wines and distilled spirits, whether deposited in one or the other class of stores, the act of 1818 required importers to pay the "expenses of safe-keeping." In the case of wool and its manufactures, the act of 1832 required the payment by importers of *customary storage, charges, and interest.* When private storehouses were employed, as they might be in the case of wines and distilled spirits, the "expenses" payable to the United States consisted principally of the compensation of the revenue officers in charge of the property. But whenever public stores were used for the custody of bonded goods—those stores being under the control of the United States as owner or lessee—the importers were liable, under the acts of 1818 and 1832, to pay, as well all incidental charges, as also specific *storage.*

3. No question of proprietorship could have arisen as to moneys received by collectors from importers, prior to 1841, in payment of the salaries of customs' officers in charge of bonded property. Nor could any doubt have been entertained in regard to storage-money, where it did not exceed the amount of rents paid for stores leased on public account by the collectors. It has been stated by the learned justice, who delivered the opinion of the court in the case of United States *vs.* Walker, (22 *How.*, 312,) that question, however, did arise before the passage of the act of 1841, respecting the right of the United States to the surplus storage, after deducting rents paid, and that collectors, deciding that question in their own favor, were in the habit of appropriating those moneys to their own use, without accounting for them to the Government.

4. Whether this statement of Mr. Justice Clifford be strictly accurate or not, it cannot be doubted that collectors had no more authority to retain, as perquisites of their office, such surplus of storage, above the rents paid by the Government, accruing from public stores employed under the early acts of 1818 and 1832, than to appropriate the rents paid by private individuals for the use of any other property owned or controlled by the United States. No statute existed, prior to 1841, which afforded the slightest color of right to such a claim. It may be true that there was no statute expressly requiring collectors to account

for the excess; but it is more true that no statute, either expressly or by remotest implication, gave them authority to treat the excess otherwise than as public moneys which they had the right to retain, in their own hands, only so long as was necessary to pay them into the Treasury. The salaries, fees, commissions, and allowances provided by the acts of September 1, 1789, (section 31;) February 18, 1793, (section 34;) March 2, 1799, (section 2;) April 30, 1802; and May 7, 1822, (section 7)—all of which were reviewed by this court in the case of United States *vs.* Walker—constituted the entire emoluments of the collector's office. All that Congress gave them, or intended to give them, (as we have the right to presume,) is mentioned in those statutes. No statutory command was needed to make it the duty of collectors to pay over any excess of storage to the Treasury. If no grant of such moneys was made to them—as none was made—by the laws prescribing their fees and providing the sources of their other emoluments, they belonged to the United States; and whenever appropriated by collectors, were wrongfully converted to an illegal use.

5. We affirm, then, that all moneys received from the owners of bonded merchandise, in store under the acts of 1818 and 1832, as storage, over and above the rents paid by the collectors for the public stores, before the passage of the act of 1841, belonged and were of right payable to the United States, without any abatement or deduction whatsoever.

SECOND POINT.

The intention and effect of the act of 1841 were to constitute the storage received from one specific class of stores a source of official emolument of collectors, to wit, *the public stores for which rent was paid by the collectors*, on behalf of the Government; and all moneys received as storage for goods stored in warehouses *owned* by the United States, as well also as all moneys received in payment of expenses incurred on the storing of goods in *private* stores, are not embraced, and were not intended to be embraced, by the fifth section of the act of 1841, and were and are payable into the Treasury.

1. The key to the correct construction of the fifth is found in the provision of the sixth section of the act of 1841, which enacts that ,'ALL STORES *hereafter* rented by the collector, naval officer, or surveyor

shall be on *public account* and paid for by the collector *as such*, and shall be appropriated exclusively to the use of receiving foreign merchandise, subject, as to rates of storage, to regulation by the Secretary of the Treasury."

This provision would seem, on its face, to have been directed by Congress against the renting of stores by collectors on their private account, and the warehousing therein of foreign merchandise. That was, in point of fact, the particular abuse intended to be corrected by the act of 1841. It was known that at least one collector—the collector at New York—was engaged, on private account, in the business of warehousing, that is, of renting stores for the custody of imported goods detained under bond, or otherwise, and charging importers rents or storage, which, being the profits of private enterprise, belonged of right to the collector. The Government lost in the same proportion that the collector gained by such arrangements. All profits of warehousing were earned by the officers. Except the mere salary of the revenue officers in charge of the goods, the Government got nothing. Storage which would have accrued to the Government, had the collectors and importers stored the merchandise in public stores, was, under such a system as that, realized alone by the officers in their private capacity. In view of these facts, and for the purpose of enabling the Government to control this source of revenue, Congress directed, on March 3, 1841, that thereafter collectors should not rent stores on private account, but that all stores leased should be on public account and paid for by the collectors as such. In other words, the policy of the act was to do away with private warehousing by collectors. The act of 1841 was not intended, as is stated by Mr. Justice Clifford, in Walker's case, to correct the abuse of the appropriation by collectors of surplus rents and storage received from the public stores owned or leased by the United States. No such abuse in fact existed. *The excess of storage and rents received from public stores was always accounted for by collectors, even prior to* 1841, *as other moneys received by them in trust for the United States.* But the difficulty was, that Congress apprehended that stores leased by collectors, on their private account, would supersede the Government's stores, resulting in the realization of nothing, in the way of storage, to the United States, but of large sums by the collectors as individual profit. The view taken by Mr. Justice Clifford, in his opinion in Walker's case, of the particular facts, in respect to the profits of warehousing, which gave origin to the act of 1841, is altogether, we respectfully submit, a mistaken one. The object of the legislature was to pre-

vent warehousing, on private account, by collectors; and it accomplished that object by directing in peremptory terms, that, after the date of the act of 1841, no collector should rent stores, save on public account, and that all such stores should be exclusively appropriated to the custody of foreign merchandise.

2. This view throws a strong light on the fifth section of the act, and shows that that section was intended by Congress to apply solely to the stores mentioned in the sixth section, namely, stores rented by collectors on PUBLIC ACCOUNT, and to the surplus of rents and storage, received from the custody of goods in those stores, and that this fund, and no other, was meant to be the source of the additional emolument to collectors. The inducement for the gift of this emolument was, probably, the trouble and responsibility required to be borne by collectors, under the sixth section, in regard to the renting of stores on behalf of the Government. Thereafter the storing of bonded goods was not to be in warehouses privately controlled by collectors, but in public stores leased on account of the Government; and, as the business would necessarily impose additional official trouble upon those officers, they were authorized to retain, out of the excess of storage received from *such* stores, all money below two thousand dollars.

3. The words of the fifth section of the act apply, and can be made to apply, only to stores of the kind or class named in the sixth section. The entire enactment in the two sections is—1. That stores rented by collectors, on public account, should be used for the storing of foreign merchandise. 2. That the rents and storage received by collectors from those stores—being public warehouses for which rent is paid—shall be accounted for quarter yearly. 3. That whenever, from such accounting, those rents and storage exceeded the rents paid for the stores, the surplus, under two thousand dollars, should be retained as emolument by the collectors.

4. Thus, excluded from the operation of the act, are two classes of stores—1. Such as are owned, not rented, by the Government; and, 2. All stores under private control, for the use of which, for storing purposes, storage is payable by the importers to individual owners or lessees, and in respect to which the United States have no claim on the importers, save for the payment of customary charges and the expenses attending the custody of the goods by the Government officers in charge of them. From goods in stores within the first class, the Government was,

after this act, entitled, of course, to claim storage; but Congress gave no part of such storage to the collectors. From goods stored in private stores storage was demandable by the owners, not the collectors. All the latter could lawfully demand, on the discharge or sale of such goods, was the salary of the revenue officers in charge. This salary was never contemplated as embraced by the fifth section. It did not stand on the footing of storage. All moneys received in payment of officers' salaries were left by the act to be accounted for by the collectors, as they had been before 1841, under the general laws regulating their duties. They were public moneys, and not liable to appropriation by collectors.

5. We say, therefore, that the intention of Congress, unmistakably impressed on the face of the statute of 1841, was to give to collectors simply a portion of the profits of the warehousing of goods in stores rented by collectors on public account; and that the fund out of which the portion due those officers was intended to be retainable was the fund realized, after the rents of such stores were paid from the storage received. There was no intention, on the part of the legislature, to give collectors, in any case where private stores, for which the Government was at no expense, were used for warehousing purposes, a portion of the moneys received from the importers in payment of charges based upon the cost to the Government of the services of the revenue officers employed in maintaining the custody of goods in such storehouses.

THIRD POINT.

Under the warehousing system established by the acts of August 6, 1846, and March 28, 1854, and the regulations of the Treasury Department made in pursuance of those acts, "*bonded warehouses*" are *private stores* for which no rent is paid by the Government, and not "*public storehouses for which a rent is paid,*" within the meaning of the act of 1841; and no moneys received by collectors upon or on account of the storing of goods in "bonded warehouses," whether denominated expenses, half-storage, or otherwise, are claimable by those officers as emoluments of their office under the act of 1841.

1. At the date of the act of 1841, there were no "bonded warehouses" in existence. They were introduced into the warehousing system, organized by the act of August 6, 1846, by the regulations of the Treasury made under the authority of the sixth section of that statute.

The statute of 1846 extended warehousing privileges, practically, to all imported merchandise. It provided for the depositing of goods entered for warehousing "in the public, or in other stores to be agreed on by the collector or chief revenue officer of the port and the importer, owner, or consignee." Then followed the Treasury regulations of February 17, 1849, issued by Mr. Secretary Walker, which classified all warehouses for bonded goods into—1. Stores owned by the United States or leased to them, theretofore known as public stores. 2. Stores in the possession of an importer, and in his sole occupancy, which he may desire to place under the customs lock, for the purpose of storing dutiable merchandise imported by himself only. 3. Stores in the occupancy of persons desirous to engage in the business of storing dutiable merchandise under the warehouse act, and performing the labor on such goods in what is usually termed the storage business. With respect to the last class the regulations provided that "before any person shall be permitted to open a store of Class No. 3, he shall enter into bond, exonerating the Government, as also the collector and all other officers of the customs, from any risk growing out of the joint custody of goods stored in said stores." The first two classes of stores were not required to be placed under bond. The features of these important regulations, the fruit of two years' experience of the operation of the act of 1846, and careful study of the European, British, and Continental, systems, received legislative sanction and further development in the act of March 28, 1854, (10 *Stat.*, 270.) This statute adopted the classification of warehouses for bonded goods designated by the regulations of 1849, and, affirming the provision of those regulations in regard to the bonding of private stores used for general warehousing purposes, enacted (section 3) "that before any of the stores owned or occupied by private individuals shall be used as a warehouse for merchandise imported by other merchants or importers, the owner, occupant, or lessee thereof shall enter into bond," &c. This act left the public stores and private stores of the first class as they were under the regulations of 1849—unbonded. The system was finally perfected by the regulations of the Treasury Department promulgated February 1, 1857, by Mr. Secretary Guthrie. They required all private stores employed for warehousing purposes to be placed under bond; and all such stores became thenceforth designable as "bonded warehouses."

2. Although the policy of the act of 1841 would seem rather to have been to encourage the employment of the public stores for warehousing

goods, the regulations of 1849 expressly declared that it was the intention of the Treasury Department to separate the Government as much as possible from any interference not required by law or the public interest with the business of storage or labor on merchandise, and leaving such storage and labor to be, as far as lawful and practicable, a matter of arrangement between the importers and the owners of such private stores as may be fully adapted to the purpose, (*Regs. of* 1849, *sec.* 2.) The view thus expressed of the proper policy of the Government induced Congress, undoubtedly, to provide in the act of 1854 (section 7) that all leases of stores then held by the United States should be cancelled as shortly as may be, and that no leases should be entered into by the United States at any port where there might exist any private bonded warehouses, after July 1, 1855.

3. In execution of this policy of getting rid of the public hired stores, and disentagling the Government from its connection with the warehousing business, the Treasury Department, in the regulations of 1849 and 1857, carefully provided that storage should only be charged to the importers by the collectors in cases where the Government was at the expense of storing the goods, and that in all other cases the importers should be answerable to the owners of the stores for the customary rates of storage. The reason of this rule is obvious. The only expense which the Government incurs where goods are warehoused by private individuals is that of securing the safety of the property, and of maintaining the lien for duties, by the constant presence and continuing custody of the proper revenue officers. The exaction of storage, or indeed of anything beyond the pay of the customs' officers in attendance, or an equivalent therefor, in case the precise amount may not be easily ascertainable where the merchant uses his own premises for storing, or is liable to pay specific storage or rent to a private warehouseman, would be to impose upon the foreign merchandise a new duty in contravention of the spirit and policy of the entire system. By the regulations of 1849, when goods were stored by an importer in his own store, he was liable to pay, at his election endorsed on the entry for warehouse, either an amount equal to the salary of the inspector in attendance at such store, or one-half of the amount *which would accrue as storage on the goods at the regular rates charged at stores of Class No.* 1. Not storage as in the case of stores of the first class, nor yet half-storage, but one-half of the amount which would accrue as storage on the goods if they had been deposited in the public stores. In respect to private stores of the second class, those regulations provided that "all arrangements

as regards the rates of *storage* must be made between the importer and the owner of the store; and that, as in the case of private stores of the first class, the only amount payable to the Government was either the pay of the inspectors, or one-half of the rates of storage chargeable in in the public stores, to be determined in advance by the importer. Comparing the regulations of 1859 with those promulgated under the act of 1846, we find that this alternative rule is not incorporated in the later series of instructions. The bond given by the importer who stores his merchandise in his own warehouse, and also by the owner of a general private warehouse, under the rules of 1859, requires the party only and exclusively to pay the salary of the officer or officers of the customs in charge of said goods, or such part of said salary as may be required in pursuance of the regulations of the Treasury Department. (*Regulations under the Revenue Laws*, 1857, *pp.* 212, 214.) The rule prescribed by those regulations, in respect to the accounts of collectors, also shows that the only moneys legally receivable, under them, from the owners or occupants of private bonded warehouses, are the salaries of the officers in attendance at the premises; and that, in the case of the public stores, storage is alone payable and receivable.—(*Ibid*, *p.* 293.)

4. It is unnecessary to consider whether, during the time laid in the rejoinder, when the moneys in question were received, the collector defendant was competent under the acts and regulations then in operation, to charge and receive for the custody of goods in bonded warehouses any other and different amount than the salaries of the customs' officers in attendance on the warehouses. Let it be conceded that he had the right to, and did, exact half-storage. Then we say that the collector defendant had no right, under the act of 1841, to retain or receive those moneys or any part of them:

(*a.*) Because they were not payable or paid in consideration of, or as compensation for, the use and occupation of the stores in which the goods were warehoused, but to reimburse the United States for the amounts expended in payment of the customs' officers in attendance on those stores; and the moneys thus received by the defendant were, therefore, not *storage* within any legal designation of that term.

(*b.*) Because those moneys were intended to be, as nearly as might be, an equivalent for the expenses of the Government in compensating the revenue officers employed in maintaining the custody of the goods; and the intent of the act of 1841 was to give the collector only

the excess of the profits of storing warehousable merchandise after the payment of the expenses attending the same.

(*c.*) Because if these moneys are liable to be appropriated by the collector, the Government, having already paid the salaries of the inspecting officers in charge of the stores, will have no fund with which to reimburse itself, and thus the collector will be a gainer at the cost of the United States, against the intent, spirit, and letter of the statute of 1841, which contemplated that the collector should benefit by the *profits* of warehousing after the Government was fully reimbursed for all expenses incurred, and not at all that he should take the gross receipts from private warehouses while the Government was required to pay all the expenses.

FOURTH POINT.

Even if "bonded warehouses" were designable as "public storehouses," and "half storage," received on account of the storing of merchandise in such warehouses, were designable as "storage," in the sense of the statute of 1841, such "half storage" could not be retained by collectors, under the authority of that act, inasmuch as the same did not accrue from goods stored in the "*public storehouses for which rent is paid,*" or from an excess of storage received above the rent paid by the collectors.

1. The defence in this suit is placed specifically upon the fifth section of the act of 1841. The case is not attempted, by the plea, to be brought within any other law. The right of the defendant to the money in question, if not sustained by the act of 1841, is not sustainable here at all. Do the allegations in the rejoinder bring the fund in controversy within that statute? The defendant claims that he has a right to retain it on the single ground that it is storage of merchandise stored in bonded warehouses. We have shown that storage, as such, was never payable on goods deposited in that class of warehouses under the statutes and regulations in force during the time mentioned in the pleadings; that neither the acts of Congress nor the regulations of the Treasury Department contemplate storage as an expense payable to the United States when goods are bonded and warehoused in private stores of either of the classes mentioned; and that storage was, therefore, never legally receivable by the collector on such goods. We have also shown that half

storage, *as such*, is equally unprotected by the legislation and regulations of the Government; and that half storage was never receivable except at the election of the importers, on the footing of compensation for the services of customs' officers. The act of 1841 applies—1. *To storage on goods stored in the public storehouses for which rent is paid.* 2. *To the excess of such storage over the rents paid.* It was incumbent, therefore, on the defendants to show, in their plea, that the moneys in question fulfilled both terms of this statutory description. That description clearly indicates what was meant by Congress to be regarded a storage. It was money due and payable as compensation to the Government for the use and occupation by importers of the public stores for which it was liable to pay rent. But all moneys paid to the Government by the owners of bonded goods in bonded warehouses are in consideration, not of the use and occupation of those stores, but of the expenses incurred by the Government in maintaining the custody and superintendence of the property deposited there. It is clear, therefore, that whatever be the name applied to such moneys, their essential legal character cannot be changed. They cannot be converted into storage, in the sense of the statute of 1841, by designating them by that name. Again: the act speaks of storage received above rents paid. That was to be accounted for, and out of *that* fund collectors were entitled to retain the maximum allowance. How can the moneys in question represent any surplus of storage above rents paid, as no rents were paid or payable for the stores where the goods were on deposit, being private stores, for the use of which the importers were liable to pay specific storage or rents to their proprietors. Where there are no rents there can be no surplus storage, and, without the existence of that fund, collectors have no claim or demand under the act of 1841.

2. The case is equally clear, if we take the allegation in the rejoinder, that the moneys in question were received as storage, in the fullest legal signification. Let it be conceded that "*storage*," was paid and received by the defendant for the storing of goods in "bonded warehouses." No right to retain it is conferred by the statute of 1841. The defendant has based his claim upon that law, and by it his claim must be adjudged. The statute, as has been fully shown, applies only to storage received from one source—"public storehouses for which rent is paid." The averment in the rejoinder is, that the alleged storage was received for the custody of goods in "bonded warehouses," that is, private stores

for which no rent was paid. No warrant exists under the statute of 1841 for the appropriation of such storage.

FIFTH POINT.

The rejoinder of the defendants, in that it does not aver that the storage which the said Macdonald retained, by virtue of his office, was storage of goods in the "public storehouses for which rent was paid" by him as collector, and also that the same was from an excess of rent and storage beyond the rent paid by the said Macdonald, is insufficient in law to bar the claim of the United States under the act of 1841.

1. The preceding remarks have anticipated the argument on this point. It is not a sufficient answer to the plaintiffs' replication to allege that the money demanded was received as storage of merchandise in bonded warehouses. The analysis which has been already given of the provision in the fifth section of the act of 1841 discloses three separate and independent terms as its constituent elements. The first is, the STORAGE OF MERCHANDISE STORED IN THE PUBLIC STOREHOUSES. The second is, STORAGE OF MERCHANDISE STORED IN THE PUBLIC STOREHOUSES FOR WHICH RENT IS PAID. The third is, THE SURPLUS OR EXCESS OF SUCH STORAGE BEYOND THE RENT PAID BY THOSE STOREHOUSES. Admit that "bonded warehouses" are, in a certain legal sense, public warehouses, Are they in the class of public storehouses mentioned in this statute? Are they public storehouses for which rent is paid by a collector? Certainly not. Admit, again, that the moneys sought to be recovered were "storage," and were paid and received as such, Are they the storage of goods stored in public storehouses for which rent was paid? Did they accrue from an excess of storage received above the rent paid by the collector? Clearly not; for, by the very terms of the plea, they were received as storage for the custody of goods in private warehouses for which no rents were paid, and in respect to which no rental in excess of storage can be predicated. The rejoinder, in other words, has not brought the claim within, but has carefully placed it without, the provisions of the fifth section of the act of 1841.

2. If no title to these moneys is well alleged under that act, the defendant is liable to pay them to the United States by the act of March 3, 1849. The first section provides "that, from and after the 30th day of June, 1849, the gross amount of all duties received from customs,

from the sales of the public lands, and from all miscellaneous sources, for the use of the United States, shall be paid by the officer or agent receiving the same into the Treasury of the United States, without any abatement or deduction on account of salary, fees, costs, charges, expense, or claim of any description whatever."—9 *Stats.*, 398.

3. The illegality of the exaction of the moneys in question as *storage* (if they were so paid) affords no ground of defence in law to the present action.

Moore vs. *Allegheny City*, 6 *Harris* (*Penn.*) *Rep.*, 56.

In that case, the surety of a collector of city taxes defended himself against liability for taxes collected by the collector and not paid over on the ground that a portion of the taxes had been levied on persons and property not subject to taxation. The Supreme Court of Pennsylvania held that, in the absence of any pretence of resistance by the tax-payers, or complaint by them of the illegality, or whisper of any intended attempt to reclaim the taxes paid to and pocketed by the collector, the defence was not maintainable.

SIXTH POINT.

The provision of section 40 of the act of July 18, 1866, (14 *Stats.*, 188,) does not entitle the defendants in error to an affirmance of the judgment.

1. It is an established doctrine of interpretation that every statute shall be confined in its operation to the future. (*Dwarris on Statutes*, 540, *et cas cit.*) Where the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, show a *clear intent* to vary the mutual relations of the parties. (*Hitchcock* vs. *Way*, 6 *A. & E.*, 943.) Lord DENMAN, in that case, said that all cases in which acts of Parliament, repealing and altering the law, had been construed as having effect at the time of the trial, turned on the peculiar wording of the acts, which appeared to the court to compel them to give the law an *ex post facto* operation.

2. The statute of 1866 is, in terms, prospective and applicable only to moneys received after its passage. It enacts that "all moneys re-

ceived by collectors for the custody of goods in bonded warehouses *shall* be accounted for as storage under the provisions of the fifth section of the act of March 3, 1841." The preceding clause of the section, subjecting to removal and other penalties a collector who shall neglect or refuse to comply with the first section of the act of March 3, 1849, (before cited,) is undoubtedly prospective, and the "wording" of the last clause, just quoted, indicates no intention that it should have a different or greater operation. The enactment simply is in effect that all moneys *thereafter* (*i. e.*, after July 18, 1866) received by collectors for the custody, &c., shall *thereafter* be accounted for as storage, &c. Even if the provision of the act of 1866 can be construed as authorizing moneys received prior to the passage of the act, but not accounted for till afterwards, to be accounted for as storage under the act of 1841, it cannot be construed as authorizing the opening of old accounts, settled and adjusted by the accounting officers, on the basis of the old law, before the passage of the act of 1866.

3. The provision of the act of 1866, referred to, may be regarded as declaratory of the view of the legislature, that moneys received for the custody of goods in bonded warehouses were not, previously to the passage of the act, to be accounted for as storage under the act of 1841.

4. But if the act of 1866 delares a rule in respect to moneys received prior to its passage, which would control the court in the determination of the present case on writ of error, the provision of section 40, referred to, is inefficient in so far as it may be invoked to support a claim, on the part of the collector, to retain out of the moneys received, during any year, for the custody of goods in *bonded warehouses*, the sum of two thousand dollars.

The storage for which collectors are accountable, under the fifth section of the act of 1841, is the amount of storage received for goods stored in public storehouses for which rent is paid, beyond the rents paid therefor by them. The laws confer a right to nothing but that *excess* of storage. There is no claim to the GROSS RECEIPTS. In the case of "bonded warehouses," as before shown, no rents are payable or paid by collectors, and in respect to the moneys received for the custody of goods in that class of warehouses, it may be said, there is no excess of such moneys, above expenses payable by the collectors, from which the maximum annual allowance of two thousand dollars can be retained.

SEVENTH POINT.

The judgment of the court below should be reversed, and the case remitted with direction to enter judgment for the plaintiffs on the demurrer.

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Assistant Attorney General.

OPINIONS OF JUDGE CLIFFORD.

King & Rich, Printers, Portland, Maine.

OPINIONS OF JUDGE CLIFFORD.

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts—October Term.

WILLIAM R. CLARK *v.* CHARLES H. PEASLEE.

CLIFFORD, J.—This was an action of assumpsit brought by the plaintiffs to recover back the amount of certain duties on imports previously paid by them under protest, and which, they allege, were illegally exacted of them by the defendant, as the collector of the port of Boston. Goods, consisting chiefly of fish and oil, were imported by the plaintiffs, and were by them duly entered for warehousing. One of the entries was made on the twenty-third day of January, 1855, as appears by the evidence in the case. Application in writing was made by the plaintiffs to the defendant, as collector of the customs, for leave to warehouse the importation in their own store, which was granted, and on withdrawing the same for consumption, they paid twenty-five dollars and twenty cents as half storage, in addition to the regular duties. Various other entries were made by them of similar goods, and in all the cases similar exactions were made of them, and were by them paid, under protest. All of the entries were made under the acts of Congress concerning the warehousing of imported goods, and the half-storage was claimed by the defendant under those laws, and the regulations of the Treasury Department. Suit was commenced on the first day of April, 1859, and the declaration, as amended, embraced sums so paid by the plaintiffs from the thirty-first day of March, 1854, to the fourteenth day of August, of the following year. Defendant pleaded that he never promised, and at the October term, 1860, the parties went to

trial on that issue. Testimony was introduced by both parties, and verdict was taken in favor of the plaintiffs for the sum of eighteen hundred and thirteen dollars and thirty-five cents, subject to the opinion of the court, upon questions of law, and with authority to amend the verdict, or to enter a general verdict for the defendant. Sufficient has already been remarked to show that the main question in this case is, whether the charge of half storage was a proper one to be made, under the circumstances disclosed at the trial. It is insisted by the plaintiffs that the charge was unauthorized and illegal, and consequently that the verdict is right. On the other hand, it is insisted by the defendant that the charge was a legal and proper one, and consequently that the whole claim of the plaintiffs is invalid, and without foundation. Amount is the only matter to be adjusted, if the plaintiffs are right; but if they are wrong, then the verdict must be set aside, and judgment entered for the defendant. Considering the nature of the question, it is evident that it cannot be satisfactorily solved without a careful review of the acts of Congress concerning the warehousing of imported goods, and of the principal regulations and circulars of the Treasury Department upon the subject.

Warehousing, as a system, was established in the United States by the act of sixth of August, 1846.—9 Stat. at Large, 53. Among other things, the first section provides, that upon the failure or neglect to pay the duties within the period allowed by law, or whenever a warehouse entry shall be made in the prescribed form, the importation "shall be taken possession of by the collector," and be deposited in "the public stores or in other stores," to be agreed on by the collector and the importer, owner, or consignee; and by the same section, such stores are required to be secured in the manner provided for by the first section of the act of the twentieth of April, 1818, entitled "An act providing for the deposit of wines and distilled spirits in public warehouse." Such goods are not only required to go into the possession of the collector, and be thus deposited under his control, but they are also required to be

kept in the place of deposit at the charge and risk of the owner, importer, or consignee. Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector, in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after deducting the usual rate of storage at the port, with all other charges and expenses, including duties, were to be paid to the owner, importer, or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying *the appropriate expenses.* Most of the provisions of the act are general in their phraseology, and doubtless were made so, because the system was new and untried in this country; and they were necessarily framed and passed without the light of experience. Details, for the most part, were apparently avoided, but the fifth section authorized the Secretary of the Treasury, from time to time, to make such regulations, not inconsistent with the laws of the United States, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under the same. By virtue of the authority conferred under that provision, the Secretary of the Treasury, on the seventeenth day of February, 1849, promulgated an extended circular of instructions and forms, in place of those previously issued, with a view to enlarge the benefits of the warehouse system in this country.—*Treas. Cir. & Dec.*, by Ogden, page 118. Those regulations greatly advanced the system by supplying import-

ant details, and prescribing the mode in which the system was to be carried into effect.

Some few details, however, were prescribed in the act itself, which must not be overlooked in this investigation. Importations in warehouse were assumed to be in the possession and under the control of the collector, and were to be kept at the charge and risk of the owner, importer, or consignee, and when withdrawn from warehouse, *the appropriate expenses* were to be paid by such owner, importer, or consignee. "Appropriate expenses" are the words of the act, but the expenses are in no way defined, except by necessary implication, arising from the obligation imposed of keeping the merchandise. Custody and control of merchandise in warehouse necessarily involves the expense of storage, superintendence, cartage and drayage. All of these elements of charge are obviously included in the term "appropriate expenses," but the amount is not prescribed, and was necessarily left to be ascertained under the regulations of the Department.

Moneys derived from that source are recognized by the act of the third of March, 1841, as public moneys, and collectors are required to pay the same into the treasury of the United States.—9 Stat. at Large, 349; *U. S. v. Walker*, 22 How., 313. Bonded warehouses, under the regulations of the seventeenth of February, 1849, were divided into three classes. 1. Public stores, or stores owned by the United States, or leased by them prior to the date of the regulations. 2. Stores in the possession and sole occupancy of the importer, and placed under a customs lock and that of the occupant, for the purpose of storing importations of the importer. 3. Similar stores in the occupation of persons desirous of engaging in the business of storing dutiable merchandise. Such classification was not, in terms, required by the act under consideration; but, in view of the explanations already given, it may be assumed that it was fully authorized by the fifth section.

Looking at the details of those regulations, and comparing them with the provisions of the act of the twenty-eighth of March, 1854, it will be seen that many of the latter were sub-

stantially borrowed from those regulations. Changes, undoubtedly, were made, and some entirely new provisions were enacted; but, in many respects, there is a marked similarity between the old regulations and the new law upon the same subject. All merchandise subject to duty might be warehoused under the act of sixth of August, 1846; but the regulations contained a provision that perishable articles and gunpowder, firecrackers, and other explosive substances, should be sold forthwith, or at the earliest day practicable, which rendered the privilege valuless in respect to all such articles; and the first section of the new law accordingly excluded those articles altogether from the benefit of the system. Other imported goods subject to duty, and which have been duly *entered* and *bonded* for warehousing, may be deposited, at the option of the owner, importer, or consignee, at his expense and risk, in any public warehouse owned or leased by the United States, or in the private warehouse of the importer, the same being used exclusively for the storage of warehoused goods of his own importation or to his consignment, or in a private warehouse used by the owner, occupant, or lessee, as a general warehouse for the storage of warehoused goods, subject to the express conditions stated in the act, and such as are necessarily to be implied from other provisions. Such selected place of storage must be designated on the warehouse entry at the time of entering the merchandise at the custom-house.

But there are other and more material conditions expressly or impliedly annexed to the option given to the owner, importer, consignee, or agent, which it becomes important to notice. Warehouses for the deposit of imported goods are divided into two classes, public and private; but of the latter class there are two kinds, as already described. Importers, under that act, can have no option to deposit any importation in a public store unless such a store be owned or under lease by the United States, because one of the main purposes of the act was to discontinue the use of all such stores for warehousing, and to provide for the establishment of private bonded warehouses. Existing leases were to be cancelled at the shortest period of their

termination, and new leases were forbidden at ports where there existed private bonded warehouses. Right of option, therefore, so far as public stores are concerned, must be considered as limited to cases where such stores were owned or under lease by the government. Conditions more express, however, in respect to the right of option to deposit imported goods in private warehouses, are to be found in the proviso annexed to the provision conferring the right. Stores must be first constituted private warehouses for the storage of warehoused goods within the meaning of the act, before any such option exists at all in respect to such stores.

Private warehouses, according to the first proviso of the section, must be used solely for the purpose of storing warehoused goods, and must have been previously approved as such by the Secretary of the Treasury, and have been placed in charge of a proper officer of the customs, who, together with the owner and proprietor, shall have the joint custody of all the merchandise stored in the warehouse; and all the labor on the goods so stored must be performed by the owner or proprietor under the supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. Cellars and vaults of stores for the storage of wines and distilled spirits only, and yards for the storage of coal, mahogany, and other woods and lumber, may, at the discretion of the Secretary of the Treasury, be constituted bonded warehouses for the storage of such articles under the same regulations and conditions as are required in the storage of other merchandise; but the cellars or vaults must be exclusively appropriated to the storage of wines and distilled spirits, and have no opening or entrance except from the street, and be under the separate locks of the custom-house and of the owner or proprietor.

Subject to these conditions and qualifications, the right of option undoubtedly is conferred by the act, but it is a mistake to suppose that it exists in the unrestricted and unqualified sense set up in the argument. Government had no public stores, except such as were already filled with imported merchandise; and in order to secure the right to deposit their im-

portations in private warehouses, the plaintiffs found it necessary to comply with the conditions annexed to its enjoyment. Other differences exist between the act of the sixth of August, 1846, and that of the twenty-eighth of March, 1854, and one or two more of them may be profitably mentioned in connection with the question involved in this case.

Private warehouses might be agreed on between the collector and importer, under the former, subject only to the condition, that the same should be kept under the joint locks of the custom-house and the importer, not in terms forbidding the use of the building for other purposes: but the latter expressly requires that private warehouses shall be used solely for the purpose of storing warehoused goods, and the application must not only have been previously approved by the Department, but the store must be under the charge of a proper officer of the customs. Provision is wanting in the act of the sixth of August, 1846, to save the government harmless from risk, loss, or expense in keeping the importation in private warehouse; but the third section of the latter act provides, that before any store or cellar, owned or occupied by private individuals, shall be used as a warehouse for other merchandise, the owner, occupant, or lessee shall enter into bond exonerating and holding harmless the government and its officers from any such risk, loss, or expense.

Authority to establish, from time to time, such rules and regulations, not inconsistent with the laws of the United States, as he might deem to be expedient and necessary, was also conferred upon the Secretary of the Treasury by the ninth section of this act. Pursuant to that authority, additional regulations and forms were framed on the second day of July, 1855, and promulgated on the same day, to give effect to the provisions of the several acts of Congress establishing and extending the warehouse system. Some alteration is made in the classification of warehouses, under these regulations, which must be briefly noticed. Class one is stores owned by the United States, or hired by them prior to the date of the instructions, the leases of which have not yet expired or been

cancelled. Classes two and three are the same as in the previous regulations, and need not be further noticed. Class four consists of yards and sheds of suitable construction, which, by the regulations, are allowed to be bonded in the manner prescribed for other depositories, and used for the storage of wood, coal, dye-woods, molasses, sugar in hogsheads and tierces, railroad, pig and bar iron, chain cables, and other articles specially authorized. Bonded yards must be enclosed by substantial fences, with gates provided with suitable bars and other fastenings, so as to admit of being secured by customs locks, and must be used exclusively for the storage of the above named goods. Sheds, also, must be provided with suitable fastenings, and be secured by the different and separate locks of the occupant and of the customs. Cellars and vaults of stores occupied for general business purposes may, under certain prescribed conditions, be used by the owner or lessee as a bonded warehouse of class two, for the storage of wines and distilled spirits only and exclusively of his own importation. Neither stores, yards, sheds, cellars, or vaults are private bonded warehouses, within the meaning of the act of Congress, until they are constituted such by the sanction of the proper authorities.

Merchants or other persons desirous of having any building constituted a private bonded warehouse of the second or third class, must apply to the collector of the port in writing, describing the premises, the location and capacity of the same, and setting forth the purpose for which the building is proposed to be used; as, whether for the storage of merchandise imported or consigned to himself exclusively, or for the general storage of merchandise in bond. Examination of the premises is then directed, and a report of the particulars required to be made by the proper officers in writing. On the receipt of the report, it is the duty of the collector to transmit the same to the department, together with the application of the party, and certain required certificates, and a statement of his own views and opinion. Decision is then made by the Secretary of the Treasury, and, if the application is granted, the

owner or occupant is then required to enter into a bond, of a prescribed form, in such penalty and with such security as the collector may deem proper. Applications for the bonding of yards and sheds as warehouses must be made in a similar manner, and under like regulations.—Reg., July 2, 1855, p. 9. Express stipulation is contained in the prescribed form of the bond that the obligor will pay the salary of the officer in charge of the goods, or such part of the salary as may be required in pursuance of the regulations of the Treasury Department.

Merchandise in warehouse was covered by a bond, under the act of the sixth of August, 1846; but the place of deposit was only secured by the joint locks of the customs and of the owner or occupant, under the superintendence of the officer in charge. Places of *deposit* now, as well as the goods deposited, must also be covered by a bond, so that all such depositories, before the goods are placed within them, are in point of fact private bonded warehouses, as described in the act of Congress. Foreign merchandise received into public stores is declared, by the act of the third of March, 1841, to be subject, as to the rates of storage, to regulations by the Secretary of the Treasury; but the charge on that account cannot exceed the usual rate at the port.—5 Stat. at Large, p. 432; Treas. Cir. and Dec., by Ogden, p. 132, sec. 35; Reg., July 2, 1855, p. 3; *Foster v. Peaslee*, Cir. Court Mass. Dist., Oct. Term, 1856. Rate of storage allowed to be charged under the regulations of the seventeenth of February, 1849, for the privilege of warehouse in stores of classes two and three, and for the time of the inspector in superintendence, was a sum equivalent to the pay of such officer, or one-half of the amount which would accrue as storage on the goods, if stored at regular rates in a public store. Other regulations and instructions upon the same general subject have been issued since those were promulgated.

Special reference is made by the plaintiffs to the regulations of the second of July, 1855, and they insist that the last named regulations had the effect to repeal those that previously existed, so far, at least, as respects the rate of storage allowed to be charged in cases of this description. Direct re-

peal is not pretended; and the rule is, where there is no repealing clause, that the subsequent regulations only have the effect to repeal those previously existing, to the extent that those last issued are clearly repugnant to the former.—Dwarris on Stat., p. 533; *U. S. v. Walker*, 22 How., p. 311. Half storage, it is admitted, was a proper charge, under the regulations of the seventeenth of February, 1849; and the admission is a very proper one, because the regulations expressly require the importer, before he can use his own store for such deposit, not only to request such use, but also to endorse on the entry an agreement to pay the collector an amount equal to the salary of the inspector, or one-half storage, and the importer was required to make his election in advance. Under the regulations of the second of July, 1855, the provision for store class two is, that for the time of the customs officer necessarily required in attendance at such store, the proprietor shall pay monthly to the collector of the port a sum equivalent to the pay of such officer; but the alternative provision for the payment of half storage is dropped. Unexplained and separated from other regulations *in pari materia*, the provision would seem to imply that the collector must in all cases exact a sum equal to the full salary of the officer in charge, which, in most conceivable cases, would be much greater than half storage. That provision is made more stringent in the regulations of the first of February, 1857, which provides that the proprietor shall pay monthly to the collector of the port such sum as he (the collector) may deem proper for the service, not less, however, than the pay of such officer.—Gen. Reg., p. 211. Appropriate expenses were authorized to be charged, and required to be paid, under the act of the sixth of August, 1846; but the charge is described in the regulations of the seventeenth of February, 1849, as one "for the privilege" and for the "time of the customs officer necessarily employed in attendance at such store." Goods duly entered for warehousing under bond, may, according to the act of the twenty-eighth of March, 1854, continue in warehouse without the payment of duties, for a period of three years, and may be withdrawn for consumption

on due entry and payment of the duties and charges, or upon entry for exportation within the same period, without the payment of duties; and the provision is, that in the latter case the goods shall be subject only to the payment of such storage and charges as may be due thereon.

Storage and charges, therefore, are the words of the last-named act, but the language of the regulations is, "for the time of the customs officer necessarily required in attendance at such store." Those regulations, however, expressly recognize half storage as a proper charge in cases where liberty is granted to the importer after entry to take the whole or any part of the goods from the vessel by paying the duties on a withdrawal entry for consumption. Payment of one-half storage for one month is expressly required under those circumstances, and the same regulations provide that charges for storage, labor, and other expenses, accruing on the goods, shall not exceed the regular rates for such objects at the port. Unless the charges for storage can be allowed to exceed the regular rates at the port, it is difficult to see how an arbitrary rule requiring the collector to exact in all cases a sum equal to full salary of the officer in charge, could be sustained. One officer, under the regulations first issued, might have as many cellars in charge as in the judgment of the collector he could superintend efficiently, not exceeding six, and the same provision is retained in the subsequent regulations in the same words. Stores of class three were expressly excluded from that rule under the first regulations, and the prohibition was retained in those subsequently adoted, and made to include classes three and four. Class two was not within the prohibition, but the regulations of 1855 provided that where one officer had charge of more than one warehouse of the second class, or more than one cellar or vault, the amount to be contributed by each must be agreed on by the owners or occupants and the collector. Authority to make such agreements was not conferred by the regulations of 1849, and the provision was changed in those of 1857, so that the amount to be contributed by each must be determined by the collector; and an agreement

in writing must be made in all cases for the payment of the compensation of the officer.

Collectors are authorized to accede to these arrangements when the circumstances render the arrangement reasonably practicable, and the public interest will not be prejudiced by it, but it is necessarily in their discretion to determine those preliminary inquiries.

Comparing the acts of Congress touching the matter in question, and the several regulations upon the same subject, one with another, it is quite obvious that the several provisions were all intended to accomplish the same general purpose. Warehoused merchandise is required to be kept by the government, and the keeping involves appropriate expenses, and the object of those provisions was to supply the means to defray those expenses and save the government harmless. Differences of phraseology undoubtedly are noticeable; but those differences have respect to matters of detail, and not of principle or substance. Importers under the first regulations had, in express terms, an election whether to pay a sum equivalent to the salary of the officer in charge, or one-half storage at regular rates, in the public stores; and, taken as a whole, I am of the opinion that the subsequent regulations do not repeal that provision. Expressions are certainly to be found in the subsequent regulations, which, if taken separately, would strongly support the view that collectors are required in all cases to exact an amount equivalent to the salary of the officer in charge; but it is not possible to support the regulations at all, if that be their proper construction, for two reasons. Regarding the charge as storage and as an arbitary exaction, then it would be contrary to law, because in most cases it would exceed the regular rates at the port; but if regarded as payment of the salary of the officer in charge, then the officer receiving it would incur a penality of two hundred dollars. 1 Stat. at Large, p. 680. Difficulties so formidable cannot be overcome, and consequently the construction assumed by the plaintiffs must be rejected. Where the interpretation of the revenue laws and regulations are involved, considerable weight should

be given to the practice of the government as a contemporaneous construction of the provision under consideration. When the subsequent regulations were issued, the practice was not changed, but continued the same; and as a general remark it may be said that it has never been changed to the present time. Full confirmation of the last remark, if any be needed, is found in the abstract of decisions forwarded to the collectors of the customs on the thirtieth day of June, 1857, by the Secretary of the Treasury. On that day certain additional instructions were issued to the collectors, and the Secretary took occasion to subjoin an abstract of decisions on questions under existing revenue laws. Among the abstract of decisions is one in respect to "storage in private stores;" and the instructions say, "it has been decided that in cases where goods are stored under bond in a private store, the importer shall either make monthly payment of a sum equivalent to the pay of an inspector placed in charge of the same, or one-half of the amount which would accrue as storage on the goods so stored if placed in public store, the importer to make his selection at the time of placing the goods in store." All of the collectors, it is believed, have conformed to that decision since it was made, and in view of all the provisions upon the subject it is difficult to see what other rule can consistently be adopted except when the arrangement is made for one officer to have charge of more than one warehouse, as before explained.—Warehouse Manual by Bruce. p. 205.

Several grounds are assumed by the plaintiffs to show their right to recover, but it is clear from the explanations already given that none of them can be sustained. 1. They insist that under the act of the twenty-eighth of March, 1854, they had a right to elect to deposit the importations in question in their own store, and that they were virtually deprived of that right by being compelled to accept the condition to pay half storage to secure the enjoyment of the right. Sufficient answer to this complaint has already been made in the previous explanations. Government had no public stores which were not full, and the plantiffs had to comply with the regulations

in order that their own stores might be constituted "private bonded warehouses." Election *was* made by them, and they *have* enjoyed the right, and in the language of the law must pay the appropriate expenses. 2. In the second place, they deny that there were any expenses, but the error of this assumption has already been shown, and the explanations need not be repeated. 3. Lastly they insist that if the collector had a right to demand anything, it was a sum equivalent to the salary of the officer in charge, and not half storage, and that no such demand was ever made. Half storage it is admitted, is much less than the salary of the officer, but the proposition is that half storage could not be exacted under the regulations; and, although the collector might have demanded a much larger sum, still as the sum received could not be legally exacted in that form, they have a right to recover it back in an action for money had and received. After full consideration, I am of the opinion that no part of the proposition can be sustained. Half storage was properly demanded under the regulations; but if the collector accepted a less sum than he was entitled to receive, the plaintiffs in this form of action could not recover it back merely because the sum paid was characterized by a wrong name. In view of the whole case, I am of the opinion that the plaintiffs are not entitled to recover; and, under the agreement, and notwithstanding the verdict, there must be judgment for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

District of Maine.

THE UNITED STATES *vs.* MOSES MACDONALD ET ALS.

CLIFFORD, J.—This is an action of debt, and the case comes before the Court upon the demurrer of the plaintiffs to the rejoinder of the defendants. Declaration is drawn upon the bond of the first named defendant as collector of the customs for the district of Portland and Falmouth in this State, and the other defendants were his sureties. He was appointed collector prior to the twentieth day of January, 1858, and between that day and the eighteenth day of April, 1861, received, for storage of merchandise in bonded warehouses, the sum of six thousand, two hundred and eighty-one dollars, as appears by his quarter-yearly account, regularly rendered to the Department. Pleadings show that the moneys so received accrued, were accounted for quarter-yearly, and were retained by the collector by virtue of his office, for storage of merchandise in bonded warehouses. Rejoinder also alleges that the moneys so received and retained by the collector in any one year did not exceed the sum of two thousand dollars, and the demurrer admits that allegation. Defendants admit the receipt of the money, but claim that the collector lawfully retained it under the act of the third of March, 1841, as part of his annual compensation. Plaintiffs deny his right to retain the amount, or any part of it, insisting that collectors cannot lawfully retain as compensation any portion of the moneys accruing from the storage of merchandise deposited in private bonded warehouses. Such is the question as frankly stated by the counsel, that both parties desire to raise in the case; and it is evident from an examina-

tion of the pleadings, that no other question of any importance is presented for decision. Unaided by former decisions, the question is one which would require an elaborate consideration, but it is not a new question, as will presently more fully appear.—*U. S. vs. Walker*, 22 How., 303.

Collectors receive a prescribed sum called salary, but their principal compensation is now, and always has been, derived from certain enumerated fees, commissions and allowances authorized by acts of Congress. Provision for such fees, commissions and allowances was first made by the act of the thirty-first of July, 1789, which also allowed to those officers certain proportions of fines, penalties and forfeitures.—1 Statute at Large, p. 64.

Those regulations were not satisfactory, and new ones were enacted in their place, as appears by the act of the eighteenth of February, 1793, and by the act entitled an act to regulate the collection of duties on imports and tonnage, passed on the second day of March, 1799, and by the Compensation Act, passed on the same day.—1 Stat. at Large, pp. 316, 627, 786.

By those several acts collectors of the customs were required to keep accurate accounts of all fees and official emoluments by them received, and to transmit the accounts to the Comptroller of the Treasury; but the collectors were allowed to retain to their own use the whole amount of emolument derived from these sources, without any limitation. Maximum rate of compensation was first prescribed by act of the thirtieth of April, 1802, as appears by the third section of that act.—2 Stat. at Large, p. 172.

Whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than five thousand dollars, the directions and requirements of the act were, that such collectors should account for the surplus, and pay the same into the Treasury of the United States. Collection districts were, by the act of the seventh of May, 1822, divided into two classes, usually denominated the enumerated and the non-enumerated ports.—3 Statute at Large, p. 693.

Emoluments of collectors for the enumerated ports, under the provisions of that act, might reach the sum of four thousand dollars; but the ninth section of that act provided, that whenever the emoluments should exceed that sum in any one year, the collector, after deducting the necessary expenses incident to his office, should pay the excess into the Treasury for the use of the United States. Three thousand dollars is the maximum rate of compensation allowed to collectors of the non-enumerated ports, under the provisions of that act, from all sources of emolument therein recognized and prescribed, and the tenth section of the act contains a provision similar to that contained in the ninth section, requiring collectors of the non-enumerated ports to account for and pay over the excess beyond the amount allowed as the maximum rate of compensation. Under those provisions, collectors might receive the maximum rate of their offices, if the office produced that amount, after deducting the necessary expenses incident to the office from all the sources of emolument recognized and prescribed by the then existing laws. No one could receive more than the maximum rate, and his lawful claim might be much less, according to the amount of business transacted in the office. Compensation of collectors remained without any material change from that time until the act of the third of March, 1841, was passed, which is the act that gives rise to the principal question in this case.—5 Stat. at Large, p. 422.

Every collector is required by the fifth section of that act to include in his quarter-yearly account, among other things, all sums received by him for rent and storage of goods, wares and merchandise stored in the public storehouses, for which a rent is paid beyond the rents paid by the collector.

Supreme Court held in *U. S. vs. Walker*, 22 How., 313, that if from such accounting the aggregate sums received from that source exceeded two thousand dollars, the collector, by the true construction of the section, was directed and required to pay the excess into the Treasury as part and parcel of the public money. But the same Court held that when the sums so received from that source did not in the aggregate exceed

two thousand dollars, the collector might retain the whole amount to his own use, and that in no case was he obliged to pay into the Treasury anything but the excess beyond the two thousand dollars. Conclusion of the Court, therefore, was, and it was an unanimous conclusion, that the compensation of a collector of one of the enumerated ports may be six thousand dollars, and that the compensation of a collector of one of the other ports may be five thousand dollars, according to the state of the importations, and the amount received from rent and storage. Port of Portland is one of the non-enumerated ports. Consequently the collector here may receive as an annual compensation for his services the sum of three thousand dollars from the sources of emolument recognized and prescribed by the act of the seventh of May, 1822, provided the office yields that amount from those sources after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, he is also entitled to whatever sum or sums he may receive for rent and storage, provided the amount does not exceed two thousand dollars, but the excess beyond that sum he is required by law to pay into the Treasury as part and parcel of the public money. None of these principles are attempted to be controverted by the plaintiffs, nor can they be with any success, as they are definitely settled by the unanimous opinion of the Supreme Court. Plaintiffs admit that such is the fact, but insist that no storage as such, within the meaning of the fifth section of the act of the third of March, 1841, ever accrued to the United States from dutiable merchandise warehoused in any other than the public stores mentioned in the sixth section of the act of the fourteenth of July, 1832, entitled An act to alter and amend the several acts imposing duties on imports.—4 Stat. at Large, p. 591.

They do not controvert the fact that the collector is charged with the custody and control of all merchandise warehoused under the laws of the United States, nor that it is his duty to demand and receive of the importer the appropriate expenses of such custody and control; but the argument is that none of the sums demanded and received for such expenses are

properly denominated storage, unless the merchandise was warehoused and deposited in stores leased by the United States. According to their theory, a collector must account for all sums received for such expenses in every case under the act of the third of March, 1841, but unless the same were received on account of merchandise deposited in a public store held under lease, he must in all cases pay the whole amount into the Treasury of the United States. But the construction is one that cannot be sustained. First, because if the act of the third of March, 1841, applies at all to the case, that part of it that provides for the appropriation of the money so received is as applicable to the case as that which requires the account. Secondly, because storehouses other than those owned or leased by the United States were recognized in the act of Congress prior to the act authorizing collectors to retain to their own use all sums received for storage, not exceeding two thousand dollars in any one year. Wines and distilled spirits, under the act of the twentieth of April, 1818, might be warehoused "in such public or other storehouses" as might be agreed upon between the importer and surveyor, or officer of inspection of the revenue for the port where the wines or spirits were landed.—3 Stat. at Large, 469.

Whether deposited in the public or other storehouses, the goods were to be kept under the joint locks of the inspector and importer, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit in writing under the hand of the collector and naval officer of the port. Custody and control were the same, whether the merchandise was deposited in a public or other storehouse; and whether in the one or the other, the expenses of safe keeping were to be paid by the importer or his agent. Importer and the proper revenue officer might agree upon a storehouse as a place of deposit other than one owned or then held under lease by the United States; but as soon as the merchandise was deposited in the storehouse, and the locks of the inspector were affixed to the doors, it became a public storehouse for the purpose of securing the goods under the warehouse system.

Suppose it to be so, still it is contended by the United States that the provisions of the act of the third of March, 1841, do not apply to the bonded warehouses described in the rejoinder of the defendants, because they insist that the bonded warehouses therein mentioned were private bonded warehouses, and they contend that private bonded warehouses are not public storehouses within the meaning of that act, which in point of fact is the only question of any importance in the case. As before remarked, they concede that the act applies to public stores, and that collectors are in all cases required to account quarter-yearly, but insist that they are not authorized to retain any portion of the amount, because private bonded warehouses are not public storehouses. Instructions of the Department require collectors to account quarter-yearly for all sums received as storage, whether the merchandise was warehoused in the stores held under lease, or in bonded warehouses, or in any other storehouses authorized to be used for that purpose as the depositories of imported dutiable merchandise; and unless the act of the third of March, 1841, authorizes that requirement, it is difficult to see on what law the instructions are based. But it is not necessary to place the decision upon that ground, because I am of the opinion that private bonded warehouses are public storehouses within the meaning of that act, and of all the subsequent acts of Congress upon the same subject. Entry for warehousing, under the act of the sixth of August, 1846, was required to be made in writing, in such form, and to be supported by such proof, as should be prescribed by the Secretary of the Treasury. Deposit of the merchandise might be made in the public stores, *or in other* stores, to be agreed on by the collector or chief revenue officer of the port, and the importer, owner or consignee; but the requirement was that the collector should first take possession of the merchandise, and such other stores as were to be secured in the manner provided in the prior act for the deposit in public warehouses of wines and distilled spirits, to which reference has already been made. Appropriate expenses were to be paid by the party making the deposit, and the whole proceedings show that the

merchandise in the latter as well as in the former case is regarded as being warehoused in the public storehouses of the United States.—9 Stat. at Large, p. 53.

All of the sums in controversy in the case of *U. S. vs. Walker*, 22 How., 299, had been received under that law, and yet the distinction set up in this case never occurred to the Supreme Court. On the contrary, the Court in that case expressly held that the collectors of the non-enumerated ports might receive, in addition to the three thousand dollars authorized by the act of the seventh of May, 1822, whatever sum or sums they might receive for rent and storage, provided the amount did not exceed two thousand dollars in any one year; and directed the charges against the defendant in that case to be settled in accordance with those principles. Considered in that point of view, that case is decisive of the question under consideration. Demurrer, it should be remembered, admits whatever is well pleaded. Rejoinder not only alleges that the whole sum sued for accrued for storage between the twentieth day of January, 1858, and the eighteenth day of April, 1861, inclusive, but that the sum accrued was accounted for quarter-yearly, and retained by the collector by virtue of his office, and that the sum accrued was so accounted for and retained in sums not exceeding two thousand dollars in any one year. Taking the admission as made, then it is clear that the only practical question is, whether the bonded warehouses described in the rejoinder are public storehouses within the meaning of the provisions of the act of the third of March, 1841, under which the same accrued, and was received, accounted for quarter-yearly, and retained. Argument upon that question is unnecessary in this Court, as the question was recently presented to the Court in another district of the circuit, and after full consideration was directly decided in the affirmative.—*Clark vs. Peaslee*, Mass. Dist., Oct. Term, 1862.

Repetition of the reasons there given for the conclusion is unnecessary, as the opinion has been published, and is in the hands of the parties in this case. Half storage had been demanded by the collector in that case, and the same had been

paid by the merchant under protest. Having made the payment under protest, he brought suit to recover back the money, upon the ground that private bonded warehouses were not public storehouses within the meaning of the several acts of Congress authorizing the warehousing of dutiable merchandise. Able counsel were heard in support of the proposition, but upon full consideration, this Court held otherwise, and gave judgment for the collector. Both parties, I believe, have acquiesced in that judgment as a correct exposition of the law of the case, and until reversed by the Supreme Court, I must adhere to that opinion. Demurrer overruled. Rejoinder adjudged good. Judgment for the defendants.